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Notice of Appeal.

Filed.

New Jersey Supreme Court.

ORAVIA M. BONFIELD, *Plaintiff,* *vs.* J. EDWARD BLACKMORE AND WILHELM BERGMAN, *Defendants.*	*Action at Law.* *Notice of Appeal.*

To WILBUR A. HEISLEY,
Attorney of above-named plaintiff.

Sir:

Take notice that defendant Blackmore appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals.

Dated, May 23, 1916.

Yours respectfully,

M. CASEWELL HEINE,
Attorney for Defendant Blackmore.

Grounds of Appeal.

Filed.

New Jersey Court of Errors and Appeals

ORAVIA M. BONFIELD,
Plaintiff-Respondent,

vs.

J. EDWARD BLACKMORE,
Defendant-Appellant.

On Appeal.

Grounds of Appeal.

The appellant states the following grounds of appeal:

1. That the court refused to dismiss the complaint on the ground that it failed to state facts constituting a cause of action.

2. That the court refused to grant defendant Blackmore's motion for a non-suit.

3. That the court refused to grant defendant Blackmore's motion to direct a verdict in favor of defendant Blackmore.

4. Because the court admitted the following questions over defendant Blackmore's objection:

Q You have no specified person who had charge or who was charged with the duty of operating that elevator on this day? (S. M., pp. 2 and 3.)

Q By reason of what the boy said to you, did you do anything? (S. M., 17.)

Q Did you see any notice there, upon which were the words as follows: "Persons riding on

this elevator do so at their own risk?" (S. M., 23 and 24.)

Q Try to give us your best recollection as to how frequently you find you can see people coming up on this elevator; I mean whether you had seen them carried up every day, for a year, or almost every day, every week or every month, or how often. (S. M., 56.)

Q When you got to the elevator shaft, can you tell us whether or not at that time the door of the shaft was open or closed? (S. M., 59.)

Q What would you say the condition of light was, briefly, immediately around this elevator shaft, and the condition of light around the Academy street entrance of the store, at the time that you called here a week or ten days after this accident? (S. M., 73.)

5. Because the court refused to strike out the following answer to the aforesaid question: "The impression of my mind at the time and other times that the store has been exceedingly dark for a public business place." (S. M., 73 and 74.)

6. Because the court admitted in evidence a certain ordinance of the City of Newark. (S. M., pages 5 to 13, and 35.)

7. Because that court admitted in evidence certain alleged rules or regulations to the building department of the City of Newark. (Pages 5 to 13, and 35.)

Respectfully yours,

M. CASEWELL HEINE,
Attorney for Appellant Blackmore.

Summons.

THE STATE OF NEW JERSEY TO J. EDWARD BLACKMORE AND WILHELM BERGMAN:

You are summoned to answer the annexed complaint of Oravia M. Bonfield, in an action at law in the Supreme Court. [L. S.]

And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, Wm. S. Gummere, Chief Justice of the Supreme Court, at Trenton, this twenty-second day of June, nineteen hundred and fifteen.

WM. C. GEBHARDT,
Clerk.

WILBUR A. HEISLEY,
Attorney.

Complaint.

New Jersey Supreme Court.

ORAVIA M. BONFIELD,
Plaintiff,

vs.

J. EDWARD BLACKMORE AND WILHELM BERGMAN,
Defendants.

Complaint.

The plaintiff who resides at 261 Prince street, in the City of Newark, N. J., complains of the defendants as follows:

1. That on the twenty-seventh day of October, nineteen hundred and fourteen, the said defendants were in possession of a certain building, known as No. 60 Academy street, and also known as the Blackmar building, in said city, and in which said building there was located an elevator which was used by the said defendants for the purpose of transporting persons from the ground floor to the upper floors of said building, and which said elevator was in charge of, and was being operated and conducted by an employee of the said defendants; that on the said day, the said plaintiff, being lawfully in and upon said premises, and desirous of being taken to an upper floor thereof, was directed by said employee to enter the said elevator, and that the said employee opened the door of the shaft in which said elevator was located, and directed and invited said plaintiff to enter; that the shaft in

which said elevator was operated, was so located that it made it impossible for the plaintiff to observe the fact, when the said employee opened said door, that the elevator was not located in said shaft so that the said plaintiff could with safety step from the floor upon which he was standing, into said elevator, but that on the contrary, the said plaintiff, without negligence, and in the belief that the said elevator was in a proper position and location, which it was not, for him to step upon when so invited by the said employee, did avail himself of said invitation and direction of said employee, and relying thereon, stepped forward through the door so opened by said employee, and fell a long distance into the basement or cellar of said building, whereby he received serious injuries, including a dislocation of his shoulder, injuries across his breast and other portions of his body and from which said injuries he is still suffering; that he was obliged to lay out large sums of money for physicians in his attendance and medicines and appliances to be used in his recovery, and that he was prevented for several months from pursuing his usual occupation, and thereby lost large sums of money which he otherwise would have earned.

2. That on the twenty-seventh day of October, nineteen hundred and fourteen, the said defendant, J. Edward Blackmore, was in possession of a certain building known as No. 60 Academy Street, and also known as the Blackmar building, in said city, and in which said building there was located an elevator which was used by the said defendant for the purpose of transporting persons from the ground floor to the upper floors of said building, and which said elevator was in charge of, and was being operated and conducted

by an employee of the said defendants; that on the said day, the said plaintiff, being lawfully in and upon said premises, and desirous of being taken to an upper floor thereof, was directed by said employee to enter the said elevator, and that the said employee opened the door of the shaft in which said elevator was located, and directed and invited the said plaintiff to enter; that the shaft in which said elevator was operated, was so located that it made it impossible for the plaintiff to observe the fact, when the said employee opened said door, that the elevator was not located in said shaft so that the said plaintiff could with safety step from the floor upon which he was standing, into said elevator, but that on the contrary, the said plaintiff, without negligence, and in the belief that the said elevator was in a proper position and location, which it was not, for him to step upon when so invited by the said employee, did avail himself of said invitation and direction of said employee and relying thereon, stepped forward through the door so opened by said employee, and fell a long distance into the basement or cellar of said building, whereby he received serious injuries, including a dislocation of his shoulder, injuries across his breast, and other portions of his body, and from which said injuries he is still suffering; that he was obliged to lay out large sums of money for physicians in his attendance, and medicines and appliances to be used in his recovery, and that he was prevented for several months from pursuing his usual occupation, and thereby lost large sums of money which he otherwise would have earned.

3. That on the twenty-seventh day of October, nineteen hundred and fourteen, the said de-

fendant, Wilhelm Bergman, was in possession of a certain building known as No. 60 Academy street, and also known as the Blackmar building, in said city, and in which said building there was located an elevator which was used by the said defendant for the purpose of transporting persons from the ground floor to the upper floors of said building, and which said elevator was in charge of, and was being operated and conducted by an employee of the said defendant; that on the said day, the said plaintiff, being lawfully in and upon said premises, and desirous of being taken to an upper floor thereof, was directed by said employee to enter the said elevator, and that the said employee opened the door of the shaft in which said elevator was located, and directed and invited the said plaintiff to enter; that the shaft in which said elevator was operated, was so located that it made it impossible for the plaintiff to observe the fact, when the said employee opened said door, that the elevator was not located in said shaft so that the said plaintiff could with safety step from the floor upon which he was standing, into said elevator, but that on the contrary, the said plaintiff, without negligence, and in the belief that the said elevator was in a proper position and location, which it was not, for him to step upon when so invited by the said employee, did avail himself of said invitation and direction of said employee, and relying thereon, stepped forward through the door so opened by said employee, and fell a long distance into the basement or cellar of said building, whereby he received serious injuries, including a dislocation of his shoulder, injuries across his breast, and other portions of his body, and from which said injuries he is still suffering; that he

was obliged to lay out large sums of money for physicians in his attendance, and medicines and appliances to be used in his recovery, and that he was prevented for several months from pursuing his usual occupation and thereby lost large sums of money which he otherwise would have earned.

4. For damages so as aforesaid received in each of said several counts of this complaint, the plaintiff demands two thousand dollars ($2,000) damages.

WILBUR A. HEISLEY,
Attorney of Plaintiff.

Answer.

Filed July 10, 1915.

Defendant, J. Edward Blackmore, who resides in the City of Newark, County of Essex, State of New Jersey, says that:

First Defense. He denies each and every allegation contained in the complaint filed herein.

Second Defense. Plaintiff contributed to the accident alleged in the said complaint by his own negligence.

Third Defense. Plaintiff, at the time of the alleged accident, was upon the premises of defendant, J. Edward Blackmore, without any invitation, express or implied, from this defendant, and without color of right or title, and at the time of the said alleged accident, was a mere trespasser upon the said premises.

M. CASEWELL HEINE,
Attorney for Defendant.

Amendment Made to the Complaint, viz., by Adding the Following Counts.

That on the twenty-seventh day of October, nineteen hundred and fourteen, the said J. Edward Blackmore, being then the owner of said building and of said elevator described in the foregoing complaint, failed and neglected to have said elevator in charge of a competent operator of reliable and industrious habits, not less than eighteen years of age, with at least one week's experience in running an elevator under the inspection of a competent person, as required by the regulations theretofore adopted and then in force, made by the Superintendent of Buildings of said city, pursuant to the ordinance of said city, duly ordained by the Mayor and Common Council of said city, reading and prescribing as follows:

"That the Superintendent of Buildings shall cause an inspection of elevators carrying passengers or employees, to be made at least once every six months, and shall make regulations for the construction, installation, alteration and operation of such elevators, and shall also make regulations for the installation, alteration and operation of freight elevators, with a view to safety, and shall also prescribe suitable qualifications for persons who are placed in charge of the running of passenger or freight elevators. No person or employee shall permit any person to be in charge of running any passenger elevator who does not possess the qualifications prescribed therefor."

Plaintiff avers that by reason of the neglect of the said defendant, to observe said regulation and said ordinance, the plaintiff was caused to fall into the said elevator shaft and receive the injuries set forth in the preceding counts.

WILBUR A. HEISLEY,
Attorney of Plaintiff.

Defendant Blackmore's Answer to Plaintiff's Amendment to Complaint.

Filed.

NEW JERSEY SUPREME COURT.

Defendant Blackmore says:

1. He denies each and every allegation contained in the amendment to the complaint herein.

2. The said amendment does not contain facts sufficient to constitute negligence.

M. CASEWELL HEINE,
Attorney for Defendant Blackmore.

Answer of Defendant Bergman to Amendment.

Filed.

NEW JERSEY SUPREME COURT.

The defendant, Wilhelm Bergman, answering separately the amendment to the complaint, says:

1. This defendant has no knowledge or information sufficient to form a belief, as to any act or failure or neglect of the defendant Blackmore, referred to in said amendment or as to the plaintiff's injury or the cause thereof, referred to in said amendment.

2. This defendant denies that any regulations were adopted by the Superintendent of Buildings of said city containing the requirements recited in said amendment.

3. This defendant denies that there is any valid ordinance of said city of the tenor set out in said amendment.

4. This defendant objects that nothing contained in said amendment charges this defendant with any duty or liability.

GUILD & MARTIN,
Attorneys of Defendant,
Wilhelm Bergman.

Service of copy of within answer is acknowledged this 12th day of May, 1916.

WILBUR A. HEISLEY,
Attorney of Plaintiff.

Reply Filed July 22, 1915.

NEW JERSEY SUPREME COURT.

ORAVIA M. BONFIELD,

vs.

J. EDWARD BLACKMORE AND WILHELM BERGMAN.

Transcript of stenographer's notes taken in the above case before Hon. Willard W. Cutler, Judge, and a jury, on Tuesday, May 16, 1916, at Newark, N. J.

Wilbur A. Heisley, Esq., for plaintiff.

Messrs. Guild & Martin, by J. H. Thayer Martin, Esq., for defendant Blackmore, and M. Casewell Heine, Esq., for defendant Bergman.

Jury impanelled and sworn.

Mr. Heisley opened for plaintiff.

Mr. Heine opened for defendants.

J. EDWARD BLACKMORE, sworn in behalf of plaintiff.

Direct examination by Mr. Heisley.

Q Mr. Blackmore, have you with you today any license to run the elevator in the building which is involved in this case?

Mr. Heine. I object to that as immaterial under the pleadings. There is no pleaded fact that any license is necessary in this State. I object on the ground it is incompetent, immaterial and irrelevant under the pleadings as no ordinance is pleaded.

The Court. I sustain the objection.

Counsel for the plaintiff objects to this ruling of the Court.

Objection noted as ground of appeal.

Q You recollect the day of this happening, you recollect the time of the happening? A Yes, sir.

Q Did you have any one in charge of that elevator that day? A I never have anybody in charge at any time particularly in charge of the elevator excepting they were an employee that was working for me and knew how to run it and then they used it.

Q Any of your employees used it? A Yes.

Q You have no specified person who had the charge or who was charged with the duty of operating that elevator on this day?

Mr. Heine. I object to that on the ground it is immaterial, irrelevant and incompetent and not pleaded as an act of negligence in the complaint.

The Court. I will allow the question.

Counsel for defendant objects to this ruling of the Court.

Objection noted as ground of appeal.

Mr. Heine. Can it be understood that when counsel for one defendant makes an objection it will apply to counsel for both defendants?

The Court. Yes, that is understood.

Q (Question read.) A No, I have nobody.

Cross examination by Mr. Heine.

Q You own that building, Mr. Blackmore? A Yes, sir.

Q How many floors has it? A Six and a basement.

Alice McCarron, direct.

Q How many of those floors are used by you in your business?

Mr. Heisley. I object as not cross examination. I have called this man at my own risk and I submit, if your Honor thinks he should be allowed to ask these questions, he should make him his own witness and not get something in for the purpose of non-suiting me.

The Court. I think that is right.

Mr. Heisley. I want to produce out of order the custodian of the records of the City Hospital.

ALICE McCARRON, sworn in behalf of plaintiff.

Direct examination by Mr. Heisley.

Q Miss McCarron, what position do you hold in connection with the City Hospital of this city? A Historian.

Q I believe there is a record kept there showing the history of each case which is brought to the hospital, is that right? A That is right.

Q Will you turn to the record of Oravia M. Bonfield. Have you found such a case? A Yes.

Q Only read that portion which we spoke of this morning. A Ward 4; name, Oravia Bonfield; address, 261 Prince street; admitted October 27, 1914; diagnosis, dislocated shoulder; complications, dactylitis, melitis; attending house physician, Dr. Van Netta; age, forty-five; occupation, minister; nationality, West Indian; discharged, November 3, 1914; result, improved; attending surgeon Dr. Haussling; fell down elevator shaft. Present history; has dislocation of right shoulder dressed in receiving room; left

shoulder fairly moveable and outer end of clavicle seems lower; no pain; pain in chest, pain in right thigh, which he moves freely. Family history inactive as to chronic diseases, tuberculosis, rheumatism, gout or lues. Previous history; childhood, does not remember any diseases; minor history, has suffered with diabetes for years; treated at Newark City Hospital for same two years ago. No other minor diseases outside of frequent colds.

Mr. Heisley. We offer that in evidence. You do not require that to be left?

Mr. Heine. No.

ORAVIA M. BONFIELD, plaintiff, sworn in his own behalf.

Mr. Heisley. I would like to have Mr. Bonfield step outside for one minute.

WILLIAM P. O'ROURKE, sworn in behalf of plaintiff.

Direct examination by Mr. Heisley.

Mr. Heisley. Preliminary to asking Mr. O'Rourke some questions, I want to read the ordinance and then show the regulations adopted by the superintendent of buildings.

Mr. Martin. You now make a formal offer of that ordinance. I want to object on the ground there isn't any authority in the City of Newark to adopt this particular ordinance; I mean this particular one that is referred to in this case.

The Court. In other words, you mean the city authorities have no authority under the laws to adopt an ordinance of this character.

I suppose it may go in subject to your objection.

Mr. Heisley. I am reading from the revised volume entitled, "Revised ordinances of the City of Newark, 1913," at page 244 and 245, section 229, which says, "The superintendent of buildings shall cause an inspection of elevators carrying passengers or employees to be made at least once every six months, and shall make regulations for the inspection, installation, alteration and operation of such elevators, and shall also make regulations for the installation, alteration and operation of freight elevators with a view to safety; and shall also prescribe suitable qualifications for persons who are placed in charge of the running of freight or passenger freight elevators. The regulations shall require any repairs shown necessary to any such passenger or employee's elevators to be made without delay by the owner or lessee.

Mr. Heisley. The following paragraph has no bearing.

Mr. Martin. Read that, too.

Mr. Heisley. "In case defects are found to exist which endanger life or limb by the continued use of said elevator, then upon notice from the Department of Buildings, the use of such elevator shall be, and it shall not again be used until a certificate shall be first obtained from said department that said elevator has been made safe."

This is the particular part of the ordinance which I desire to refer to:

"No person shall employ or permit any person to be in charge of running any pas-

senger elevator who does not possess the qualifications prescribed therefor.

"Every freight elevator or lift shall have a notice posted conspicuously thereon as follows: 'Persons riding on this elevator do so at their own risk.'

"Before any elevator, escalator, or lowerator, is erected in any building in the City of Newark, a permit shall be obtained from the Department of Buldings, for which a fee of $2 shall be paid."

Q What official position, Mr. O'Rourke, do you hold in the City of Newark? A I am superintendent of buildings of the City of Newark.

Q And as such superintendent of buildings have you made regulations for the elevators in this city and specified the qualifications to be possessed by those who operate them? A Yes, sir; we have made a general set of regulations.

Q I show you a printed paper, entitled "Regulations for the construction, operation and inspection of elevators," and ask you what that is? A Those are the regulations which have been adopted by the department for the construction and operation and inspection of elevators.

Q And were they in force and effect during the entire month of October, 1914? A Yes, sir; they have been in force since about 1911.

Mr. Heisley. I offer it in evidence.

Mr. Martin. I object on the ground already stated with reference to the ordinance and on the further ground that there is not any evidence of any formal adoption or promulgation of these alleged regulations,

there isn't in evidence as yet how the regulations were adopted, whether they were made manifest to anybody at all. The superintendent simply says there are regulations to be made but not that he made manifest. There was no promulgation of those regulations.

Witness. I did make those regulations.

Q As superintendent of buildings? A Yes, sir.

Q These regulations are printed, as you know? A Yes, sir.

Q Were they given to anybody who came to the office and applied for a copy of the rules and regulations? A They are on file and anyone can have them.

Q People who came to take out licenses or talked about installing elevators, would they be handed one of these? A Yes, sir.

Q Is that the way you would promulgate them? A Yes, sir; that is the method.

Q You didn't advertise them in the *Evening News* or *Star Eagle?* A The whole building ordinance was advertised before it is put on the books.

By Mr. Heine.

Q You mean by that the building code? A The whole building code.

Q So you made this ordinance in pursuance of the building code and not in pursuance of this ordinance, No. 229? A I understand 229 is a portion of the building code.

Q Is that what you made your ordinance from? A I promulgated or published those regulations pursuant to the building code.

Q The building code is a different proposition from this particular ordinance here, isn't it? A I don't understand so. I understand they are the same.

Q They are different phraseology? A No, sir; the phraseology is the same. The numbers of sections are slightly different.

Q When you made those printed regulations there were elevators in operation in Newark, weren't there? A Yes, sir.

Q You keep those printed blanks at the City Hall? A Yes, sir.

Q Did you give any of those to the owners of elevators who were then running and operating elevators? A Not to my knowledge.

Q Those that might happen to come in? A Yes.

Q Did you ever file a copy of these regulations with the City Clerk or any other official of the City of Newark? A They are filed with the City Clerk.

Q Are you sure? A I am not absolutely sure, but there is a ruling we must file everything with the borough of municipal record, City Hall, and I have no doubt they have been filed along with everything else.

Q Would you be surprised to learn that that bureau says there is no such document on file? A I would be surprised.

Q You have no definite recollection of ever filing them with any such department, have you? A No, I haven't any personal definite recollection of that.

Q Is there in your office a copy of those regulations signed by you? A Well, I presume so; I am not sure of that. When getting those out I write them out, make interlineations,

corrections and so forth, and then I have them printed.

Q The building code was adopted in 1911? A The last bill of 1910. It was published in 1911.

Q Some two years before this book of ordinances? A This is a recent revision, a revision of the ordinances of the city.

Q This paper was prepared in 1910 or 1911, was it? A 1911.

By Mr. Heisley.

Q Was it under this same ordinance authorizing you to prescribe rules and regulations? A Yes, sir.

Q I want to see whether there is any question in your mind about your having any written copy of these regulations. Do you recollect? I am speaking about some time ago and my asking you about that and your saying you had none but these were the only ones you had? A Yes, those printed forms are the only ones you saw.

Q Because somebody might compel you to show that without a written copy? A There was a question whether there was a signed copy or whether there was a written copy.

By Mr. Heine.

Q Officially signed? A I do not recall any officially signed copy.

Mr. Heisley. I offer it in evidence.

The Court. Do I understand the point that counsel is raising is that this regulation was made prior to the copy of the ordinance?

Mr. Martin. That is one of the objections.

William P. O'Rourke, cross.

The Court. I will admit it subject to your privilege to move to strike it out.

Mr. Heine. Does that cover the question of promulgation?

The Court. Yes, both of them. There may be a question raised whether or not they were filed with the Department of Records.

Paper marked Exhibit P. 1.

Cross examination by Mr. Martin.

Q Did you ever give any notice to either of the defendants in this case that you considered the elevator in Mr. Blackmore's building objectionable in any way under the ordinance or under these regulations?

Mr. Heine. I object as immaterial and not cross examination. He wasn't obliged to give them any notice. They were obliged to conform to his regulations.

The Court. I am going to allow the question subject to your objection. I will allow it on this theory: suppose it appears it was not a former promulgation and he had an actual notice of the passage of the ordinance; I do not think the question of promulgation would have anything to do with it.

Q (Question repeated.) A Not to my knowledge.

Q You have detectives under you? A Yes, sir.

Q Do they visit the buildings? A Yes, they do.

Q Let me ask you. During the last three or four years have you always maintained a public

office in the City Hall here in Newark where these papers could be obtained?

Mr. Heine. I object to that as irrelevant and incompetent.

A Yes, sir.

Q How long have you been superintendent of buildings? A Something over eight years.

ORAVIA M. BONFIELD, plaintiff, recalled in his own behalf.

Direct examination by Mr. Heisley.

Q Mr. Bonfield, you are the plaintiff in this suit? A Yes, sir.

Q Where do you live? A At present 144 Livingston street.

Q In this city? A Yes, sir.

Q Are you a single man or married? A Single.

Q What is your occupation? A Clergyman.

Q Of what denomination? A Presbyterian.

Q How long have you been a Presbyterian clergyman? A Since the beginning of this century. I graduated from Lincoln University on the 1st of December, 1901.

Q Where is Lincoln University? A Pennsylvania.

Q Philadelphia? A A little way out of Philadelphia in Pennsylvania; Chester county, Pennsylvania.

Q In 1914 were you assigned to any church or parish or diocese here in Newark? A Yes, I am doing the mission work in connection with Rev. Stubblebine.

Q Where is his church located? A Corner of Charlton and Spruce streets.

Q How long have you been with Stubblebine? A It will be eight years this month.

Q He has a white church there? A Yes, and this work is carried on in the same building.

Q You have charge of that? A The colored work, yes.

Q Under Mr. Stubblebine? A Yes.

Q What was your compensation to be in 1914 for the work which you did or were to do in that capacity? A It was about $600, the mission work, and what I made otherwise in lecturing.

Q Did you lecture at times? A Yes.

Q On what subjects? A On different topics, illustrated lectures. Sometimes the Life of Christ, sometimes a lecture on the progress of the negro.

Q Would you go about the country? A Yes.

Q Was that remunerative to you or not? A Oh, yes, it was quite a help.

Q Now, on the 27th of October, 1914, I believe you met with an accident in this Blackmore building, is that right? A Yes, sir.

Q I would be obliged if you would just turn to those gentlemen sitting here and tell them how you came to go to the Blackmore building and what happened there and how it happened? A I am interested in a union among the colored people known as a Sunday School Union and it was assigned to me to secure a stand, one of those altars that are being used by photographers. A friend of mine who is a photographer, Mr. Oliver, who is now working at the *Star-Eagle* office came to me and he said this photographer would be able to supply one of those stands.

Q Had you ever been to the building before? A No, sir. A gentleman of the city had promised to pay for this stand if we could secure one and I went, I think about the noon hour; when I got there and as I was entering the door a lad came out and asked who I wanted to see, and I said, "I want to see the photographer," and he said, "Follow me, and I will take you up on the elevator."

Mr. Heine. I object to that, as to any conversation with any lad unless he is connected with Mr. Blackmore.

The Court. Yes, that is true. Strike it out unless you connect it up.

Mr. Heisley. I am going to prove by witnesses that it was the practice to take people up in this elevator.

(Question and answer read.)

The Court. What the boy said will be stricken out.

Counsel for plaintiff objects to this ruling of the Court.

Objection noted as ground of appeal.

Q Did the boy say something to you, yes or no? A Yes, sir.

Q By reason of what the boy said to you did you do anything?

Mr. Heine. I object to that as calling for a conclusion.

The Court. I will allow that.

Counsel for defendant objects to this ruling of the Court.

Objection noted as ground of appeal.

A Yes, sir.

Q What happened?

Oravia M. Bonfield, direct.

By the Court.

Q What did you do? A I followed him to the elevator.

By Mr. Heisley.

Q You say "to the elevator?" A The elevator is a little way in from the door. There is a stairway on the same side. In from the door there is the elevator.

Q Is it a fact or not and if it is not, why, you will correct me, that the hallway leads in just to the stairway itself? A Yes, sir.

Q And to get to the elevator you have to go—

Mr. Heine. I object to that as leading.

The Court. That is leading.

Q How do you get to the elevator from the street?

By the Court.

Q How did you go to the elevator on that day?

Mr. Heisley. There is the only way that he can go.

Mr. Heine. I object to counsel testifying.

A I started following this boy to the elevator, which is a way in the store on the same side as the stairway, more under the stairway in that direction, and after we reached the elevator he stood to the side and he opened the door and stepped in the sideway. Of course, there was no light there and the light is cut off somewhat by the stairway and the window which is in front and does not give much light toward the elevator—when he opened the door and stepped in the sideway I looked straight ahead and stepped

in. Of course, there was nothing to indicate that the elevator wasn't there.

Mr. Heine. I object to that as calling for a conclusion.

The Court. Yes, ask the witness what was there, describe everything that was there.

Q Was there any other way of getting to this elevator excepting the way that you went? A I know of no other way.

Q When you say that the boy opened the door what door do you mean? A The elevator door.

Q The door to the shaft or the door to the elevator? A The door to the shaft, where he opened the shaft door to get into the elevator.

Q How did that door open, if you recall? Did it swing or did it slide? A It seemed to me—

By the Court.

Q Do you remember? A Yes sir. He pulled it this way.

Q Did it slide or— A Slide, yes.

Q Not swung around on hinges but slid? A Yes.

Q As he did that what did he do? A He stood sideways, he stepped in a side position just as one would in giving you passageway to go in.

Q Did he or did he not step out of your way and from between you and where the door was? A Yes, sir.

Mr. Heine. I object to that as leading.

The Court. Yes, that is leading.

Mr. Heine. I move to strike out the answer.

The Court. Yes.

A He stepped sideways but in going in—

Q Come down here. Suppose that this is the wall and here is the elevator door, elevator shaft is inside. Suppose you are the elevator boy and I am Bonfield. Show the jury how he moved this door and how he stepped. A He pulled the door this way and stood this way and I was right here as he opened the door.

Q Did he attempt to stop you in any way? A No, sir.

Q Did he warn you not to step in? A No, sir.

Q Did he say anything to you about there not being any elevator there? A No, sir.

Mr. Heine. I object to that as leading.

The Court. The Court has already ruled on what this boy said. You may strike out what he said, the boy said.

Counsel for plaintiff objects to the ruling of the Court.

Objection noted as ground of appeal.

The Court. As it stands now we will strike it out unless you show that the boy was employed by Mr. Blackmore.

Q Was there anybody there except Mr. Blackmore that you saw.

Mr. Heine. I object to that.

A No, no one. I didn't see anyone.

Q Was the store door unlocked from the street? A Yes, sir.

Q Did you and the boy have any trouble getting in the store?

Mr. Heine. I object to that as calling for a conclusion.

The Court. The question is how he got in the store.

Q How did you get in the store? A I went in. The door was open. As I stepped in this boy came up.

Q Was the door open you say when you went in the store door? A Yes, sir.

Q You don't mean merely unlocked but standing back?

Mr. Heine. I object to that as leading. The witness testified positively the door was open and then counsel proceeds to suggest to him he may have made a mistake.

The Court. I think the witness has said that the door was open and he walked in.

Q Was the door unlocked when you went in the store? A Yes, sir.

Q Was it closed or open when you went in the store, the door? A It was open, that leads from the street.

Q Was anybody there in charge of the store that you saw?

Mr. Heine. I object to that as a conclusion.

The Court. Yes.

Q Was there anybody in the store but the boy that you saw? A No, at that time I did not see any one excepting the boy.

Q What happened to you after you stepped to the door of the shaft? A As I fell down—I stepped in—down I went. There was nothing there and I fell to the—

Q Cellar bottom? A Yes.

Q Was there any elevator there? A No, sir.

Q Why didn't you observe the fact, if you know, that the elevator was not there?

Mr. Heine. I object to that as calling for a conclusion. This witness is being exploited here for the benefit of his case.

The Court. I think the question is objectionable. We will get all the facts and then the jury will say whether or not the man was negligent in his action.

Q Do you know why you didn't observe that the elevator was not there?

Mr. Heine. That calls for two conclusions.

The Court. Yes, I think it does.

Counsel for plaintiff objects to this ruling of the Court.

Objection noted as ground of appeal.

Q Did you see any elevator there? A No, sir.

Q Did you look to see if any was there? A Yes, I looked ahead of me as I went in.

Q Did the line of your vision as it passed through this door go in the direction of the shaft or not? A I did not know where it was but following the boy, when he went there, of course, going in from the light, I followed him and when he stopped and opened the door, then, as I said, I stepped in.

Q As you stepped into the door of the shaft were your eyes open? A Yes, sir.

Q Where were you looking? A Ahead of me.

Q Into the shaft? A Yes, right in.

Q Did you see any elevator? A No, sir.

Q Was there any light there? A No, sir.

Q Is there anything the matter with your eyes? A No, sir.

Q Was your eyesight good on this day? A Yes, sir.

Q Did you see any warning there saying in effect that any person who rode on that elevator rode at their own risk or peril?

Mr. Heine. I object to that. That is not pleaded as evidence or claim of negligence. The failure of any such warning or absence of any warning is immaterial under the pleadings.

Mr. Martin. I also want to object on the ground that the question is leading and further that the witness saw a notice is not the proper way of proving that there was such notice there.

Q Did you see any notice there upon which were the words, as follows: "Persons riding on this elevator do so at their own risk." A No, sir.

Counsel for defendant objects to this ruling of the Court.

Objection noted as ground of appeal.

Q As a matter of fact, do you know where the elevator was at the time you stepped into the shaft? A Yes, sir; I now know.

Q How soon after you fell did you locate the elevator? A When I fell I discovered then I was unsafe rather than—

Q How soon did you find out where the elevator was? Did you while you were in the shaft, I mean?

Mr. Heine. I object to that as leading.

The Court. That is leading.

A I discovered as soon as I fell. I discovered the elevator was not there.

Q Did you discover where the elevator was? A I discovered it was above.

Q When did you discover that? A When I fell.

Q After you struck the bottom, you mean? A Yes, sir.

Q Where was it? You say above. How far up was it?

Mr. Martin. How does he know this?

Mr. Heisley. He saw it from the pit.

Mr. Martin. He has not said he saw it.

A When I fell I fell in something that wasn't an elevator.

Q I am trying to find out when it was that you became—when it was you discovered that the elevator was above the floor of the store. When was that? A As soon as I fell.

Q How did you discover? A When I got down on the landing, when I fell on the landing I fell across something and I understood that—

Mr. Heine. I move to strike out what is understood.

The Court. Yes, strike out the word "understood."

Q Did you see the elevator? Did you look up and see the elevator?

Mr. Heine. I object to counsel leading.

The Court. Yes, that is very objectionable.

A I did not see the elevator but the place was dark and I discovered since the elevator wasn't there for I was told since——

Mr. Heine. No.

The Court. Not what you were told.

A Someone took me up. I did not know the person who took me up but after someone took me up and I know when I got on the main floor a chair was there and I was placed on it.

Q What I am trying to find out is if you knew of your own knowledge before you left that building where the elevator was? A Yes, sir.

Q How did you find that out of your own knowledge? A From the fact that when I stepped and thought I was on the elevator I went down.

Q Very well. You knew that the elevator was not down there, but I want to know how you found out that the elevator was above. You have said there wasn't any elevator there. Did you see it at any time that day? A No, I did not see, not to my knowledge.

Q When you lay there in the cellar what would you say what it was as to being light or dark? A It was dark.

Q Was there any light that came into that shaft that you could see excepting the light from the front of the store? A No.

Mr. Heine. I object to the latter part of that as leading.

The Court. You have the fact of the open door there. There must be some light.

Mr. Heisley. I want to find out if there was any light excepting the light that came in from the windows.

The Court. I will allow that. I do not think there is any objection to that.

Q (Question read.) A No.

Q Were there any windows in the shaft that you noticed that allowed light to come in? A No, I didn't notice any.

Q Was there any lamp or light burning there near the elevator door that you stepped into? A No, I didn't see any.

Q What would you say as to the condition of the light at the door in the shaft, how did it compare with the light in the street, for instance?

Mr. Heine. Which side of the door? I object to the question unless the condition of light is that on the side of the door or outside of the door.

Mr. Heisley. I mean where he is.

Q (Question repeated.)

The Court. I think that is competent. Perhaps you ought to make it more definite.

Mr. Heisley. I have asked him what the condition of light was at the door. I don't think I ought to be compelled to adopt the question of counsel on the other side.

The Court. At the door may be answered.

A It was rather dim in comparison with the light from the outside and coming in from the light outside and when I got to the door of the elevator it was dim. There was no light there.

Q Were you hurt any or not? A Yes, sir; I dislocated my right shoulder and I fell across something which gave me a severe pain across the chest and coming right over the arm and also I struck my thigh.

Q Which thigh. A The right.

Q How did you get out of the elevator shaft? A Well, that is what I don't know. I could not say just how I got out.

Q Were you conscious or unconscious? A I was semi-conscious.

Q When you regained consciousness where did you find yourself? A I was sitting on a chair.

Q Where? A On the main floor.

Q The floor that you had passed over in going to the elevator? A Yes, sir.

Q From there where were you taken? A I asked them to take me to the German Hospital.

Q Where were you taken? A I found the day after I was at the City Hospital. I didn't know it until the following day that I was at the City Hospital.

Q How were you taken there? A I think the city ambulance.

Q You went in an ambulance? A Yes, sir.

Q You are a West Indian, aren't you? A Yes, sir.

Q English West Indian? A Yes, sir.

Q How long were you in the City Hospital? A A week after I went there, for the first four days I suffered much pain and toward the latter part of the week I was told I would have to give up my bed for someone else. I was sitting up but I couldn't do much lying down; the pain was severe in the chest especially and I couldn't rest on the right side and when I was told that then I asked the doctor to send me to the German Hospital because I have been there before.

Q Did you go to the German Hospital? A Yes, sir.

Q How long were you there? A Three weeks.

Q You were treated there for diabetes? A Yes, I was there before, I think in 1912.

Q Was your shoulder replaced or reset in the City Hospital? A Yes, sir.

Q Did that cause you any pain or not? A Much pain.

Q What effect upon your sleeping, if any, did this pain from this injury that you received, cause you? A At first I could not sleep. The first night there was no sleep.

Q How many nights was it you couldn't sleep? A About four nights.

Q After that how about your sleeping? A I had broken rests. If I turned it would smart me and I would wake out of sleep. I rested after four days better than I did at first.

Q Were you attended by any other physician? A Yes, sir; after I asked to go home from the German Hospital I found the pain was still severe and I was treated. I went to the Presbyterian Hospital to see the doctor there and after he examined me he said it was best for me to go to his house and take the electrical treatment and I was under his treatment for two or three months.

Q How long was it before you got so you could go around and tend to your business, take up your church work? A Not fully until around about March. In the spring I was more able to do it.

Q When did you do any work in connection with your church after your accident? A Some time in January I came up to the church but not —I wasn't doing anything, very much work.

Q But you did some? A Yes, sir.

Q In March following I understand you to say. A I was able to do more. I could not then do any of the lecturing. In fact, I haven't been able to do much of that.

Q What is the name of this doctor that attended you at his house, gave you electric treatment? A Dr. Robertson, of Union street.

Q Who sent you to him? A Rev. Mr. Stubblebine.

Q He is in court today? A Yes, sir.

Q During this time in which you were incapacitated, as you say, did you lose any of your salary or compensation or not? A Yes, sir.

Q Did the church pay you anything? A Yes, but much of it has to be raised by my exertion.

Q Answer my question specifically. Can you tell the jury whether or not you lost any of your compensation by reason of this accident and if so, how much did you lose? A In the neighborhood of $300.

Q How do you figure that? A From what I received.

Q Have you any doctor's bills to pay? A No, sir.

Q Did you have any expenditures for medicines or liniments and so on? A Yes sir,.

Q How much did that amount to? A About $7.

Q Was your shoulder bandaged in plaster for any length of time? A Yes, sir.

Q White plaster bandages? A Bandages.

Q Did they put you in bandages at the City Hospital? A Yes, sir.

Mr. Heine. I think we may better have this from the witness.

The Court. Yes.

Q How long were you in bandages or plaster at the hospital?

Mr. Heine. He has not said he was yet.

A At first after it was bandaged the next morning.

Q You did have it bandaged? A The first bandage seems to have been very severe for the next morning—

Mr. Heine. I move to strike out "very severe."

Q Where did they put the bandage? A The first bandage was over the shoulder and all around my body. I remember the next morning when the doctor came he thought it wasn't properly done.

Mr. Heine. I object to what the doctor thought.

The Court. Yes, what he thought the next morning.

A They cut off that bandage and rebandaged it.

Q How long did they keep the bandage on? A While I was there and also while at the German Hospital.

Q How long did they keep the bandages on you; two weeks, months, what? A While I was there during the month the bandage was on and after I left.

Q How long did they keep the bandages on you? A About two months.

Q Have you entirely recovered from your injuries?

Mr. Heine. I object to that as calling for a conclusion, also as improper from this witness.

The Court. I will allow him to answer the question.

Q Have you entirely recovered? A No, sir.

Q In what respects do you say you have not fully recovered?

Mr. Heine. Same objection. Calls for a conclusion.

The Court. Yes, go on.

A Ever since there has been a continual pain that leads from this side up into the head. It is not as intense.

Q You are indicating the left side of your head, aren't you? A Yes, sir.

Q From your ear? A From the neck right up into my head there has been pain which at first was very intense and that has reduced a great deal and it is not as severe now as then.

Q It has improved? A It has improved.

Q Did you ever have this pain there in your neck before the accident? A No, sir.

Q Was it a continuous pain after the accident or only once in awhile? A It continued.

Mr. Heine. I object to that as leading.

The Court. I do not think it is objectionable as being leading.

Q The judge says you may answer whether it was a continuous pain at intervals? A It continues even now when I turn. It is not as intense as it used to be but if I should do much studying I feel it and if I exert very much—

Q Suppose you are sitting still looking at me have you any pain there now? A No, looking straight at you I do not.

Q When you turn your neck? A It is sensitive.

Q You have pain then? A Yes, sir.

Q Otherwise you are all right? A In cloudy weather I feel the effects in the shoulder.

Q But you are able at the same time to do your work practically the same as you were prior to the accident, is that right? A Yes, the only

thing I feel—take for example Sunday, if I should use much exertion I feel the effects more now, more sensitive to the effects than before the accident.

Q Does that affect your sleeping in any way? Can you sleep on the left side? A That affects my sleeping this way. I have to put something—I can't rest my head on a high pillow. It has to be low and I have to rest something in the centre so that my head may have a low rest.

ADJOURNED TO WEDNESDAY, MAY 17, 1916,
AT TEN O'CLOCK, A. M.

SECOND DAY.

Wednesday, May 17, 1916.

Met pursuant to adjournment.

Present, counsel as before stated.

ORAVIA M. BONFIELD, resumes the stand.

Direct examination (continued) by Mr. Heisley.

Q Mr. Bonfield, when you went to this building, No. 60 Academy street, did you know who you were going to call on, what store you were going into or who you intended to transact business with? A I knew the store, but not the person in charge of it that I would call on.

Q Did you know what store they were at? A No, sir.

Q You mean when you say you knew the store you knew the building? A The number of the building.

Oravia M. Bonfield, cross.

Q What number was that? A I think it was 60.

Q Academy street? A Yes.

Q Did you know what floor of the building the photographer was on who you intended to see? A No, sir.

Mr. Heisley. I might say that Mr. O'Rourke says that he has looked in the City Clerk's office, as he promised yesterday and in his own office and can find no—

Mr. Heine. No signed copy and no copy on file with the City Clerk.

Cross examination by Mr. Heine.

Q What were you looking for, what were you going to buy? A Holder for a pole that is used by photographers.

Q Who told you where to go? A Mr. Alba, a photographer.

Q Who is Mr. Alba? A I think he is now the photographer at the *Star-Eagle.*

Q Did he tell you the name of the photographer to whom you were to go to get this? A No.

Q As you approached this building on Academy street how did you locate it? A I went to the number.

Q Where was the number? A The number was up.

Q What part of the building was the number on? A I didn't pay much attention to that, but I know it was the number which was given, 60.

Q Did you or did you not see a stairway there? A I went in the building.

Q Did you or did you not see a stairway there? A Yes, I saw a stairway.

Q Did that stairway go up in that building, No. 60, go toward the upper floors? A Possibly so.

Q You were there and saw it? A Yes, but I didn't know anything about the building any more than going in it.

Q You saw the stairway. Did the stairway go up toward the upper part of that building? A It goes up.

Q You saw it that day going up? A Yes.

Q As far as you could see? A Yes.

Q How far up that stairway could you see as you looked up? A I didn't take much notice.

Q How far could you see? A I didn't pay much attention to that. I can't say I saw the stairway. I didn't look up to see how far I could see.

Q Do you recall now whether you could see up ten steps, twenty steps? A No, I did not.

Q Have you any recollection now? A Not to the extent but I know there was a stairway.

Q What was the character of this stairway; was it wooden, stone or iron treads or what? A I took it to be wood. As I said I didn't pay much attention.

Q Did you ascertain that from looking at it or did your shoes come in contact with it? A By looking for I didn't go up the stairway.

Q Can you describe any better than you have the stand or pole or standard which you wished to purchase? A Not any more than the information given by Mr. Alba. He said that there was a photographer there and he is an old photographer of the city and he believed just what I wanted I could secure from him.

Q How did you describe that? A I wanted a holder to hold a pole.

Q What kind of a holder? A A pole that would be for a flag or something like that.

Q You mean a metal base with a hole in it? A Yes, to rest it in.

Q A metal base with a tube coming up from it and a hole in that tube? A Yes, enough to hold a pole for photographer's use.

Q You say this kind of a standard was what photographers used. What use do you know that photographers have for such a standard? A No more than what this photographer told me.

Q You mean Mr. Alba? A Yes.

Q Mr. Alba told you you could get such a thing at a photographer's? A Yes.

Q You said that you lost $300 by reason of your being unable to attend to your mission work. Just how is that or where did that loss occur? A The work being mission work, it depends largely on my going around and entertaining and such like to make that up. I am working among the children of the South, colored children—

Q You received a salary of $600. That is Mr. Stubbelbine's church? A No, it is made up from what we raise, make up the $600.

Q That is voluntary collection? A Yes.

Q By these entertainments? A Yes.

Q And anything you collect over the $600 is turned into the church? A No, anything over that I simply give an account to the church.

Q That employed you? A Yes.

Q These entertainments which you go around and hold are— A —no, they are at the church; not outside.

Q You received $600 for holding those entertainments at the church? A At the church and

the members of the church, the colored way of working, sometimes they give a sociable, workers would give a sociable or donations and they would make Sunday collections.

Q With what corporation was your agreement to receive $600? A With the Bethany Presbyterian Church.

Q Was this to be paid to you in monthly or weekly installments? A Just as it is raised.

Q Did they agree to pay you $600? A Yes.

Q The church agrees to pay you that? A Yes.

Q If there is not enough collections to do that the church promises the difference? A Bethany is responsible for $300.

Q Then your agreement with the church is to receive $300 from that? A And the people are responsible for the other $300.

Q What do you mean by the people? A The workers of the mission, the people who work with me in the mission.

Q If the amount is not realized in collections do those people pay you the other $300? A We always raise it.

Q Is their agreement to pay you $300 paid only if it is collected? A That is the understanding. Mr. Stubblebine told them. If they raise $300 the Bethany Church would raise the other $300.

Q What is the name of this mission? A Bethany Presbyterian Mission.

Q So the Bethany church agrees to give you $300 and the Bethany mission agrees to give you the other $300? A Yes, that is what we pledged ourselves.

Q Do they agree to give you that; does the mission agree to give you that $300 absolutely

or does it only give it to you if they collect it? A They agree to give that absolutely.

Q When you were hurt did the church or the mission refuse to pay you during the time you were incapacitated for work the amount coming due every week or month? A They didn't refuse, but I am the one to raise that money and the fact I was unable to go around to carry on the entertaining feature to raise that money, it has not been raised.

Q I understand your going around and raising it didn't have anything to do with their paying? A That is the only way it is paid for it must be raised.

Q If you didn't raise it you didn't get paid? A No, that would not be gotten because to work with them in our colored church work, the pastor has the burden of raising the money along those lines.

Q That is a burden that we all know about but what I want to know about is whether or not you received a regular salary independent of your own effort of raising it? A Yes, sir; that is connected with raising the $300.

Q If your efforts are not sufficient to realize $300 who makes up the difference? A I have to go without it.

Q So then the Bethany mission does not agree to pay you $300 absolutely unless you can go out and through those socials and work of your own collect it? A Yes, co-operating with them to collect the $300.

Q So your fixed salary then is only $300 a year? A It was understood to be $600.

Q You have just stated you have to raise the $300 yourself. You go out and get it? A In co-operation with them.

Q Does the Bethany church pay you their $300 or contribution during the period you have been injured? A They pay in proportion.

Q Regardless of your injury? A Yes.

Q But the mission didn't pay you because you were not able to go out and get it? A No, they didn't raise the amount.

Q So that the only money you were absolutely sure of them would be the $300? A The $300 with what was raised.

Q From the church, I mean during your sickness? A Yes.

Q The only money you are sure of would be the $300 from the church, is that right? A With what is raised by the mission. They have raised what they can.

Q How much did the mission raise during the period from October, 1914, until March 1st—first week in January, 1915; October, 1914 to January, 1915, how much did the mission pay you? A I can't say definitely just how much that was.

Q You were able to figure that you lost $300? A Yes.

Q Did you receive your usual proportion from the Bethany church, did you not receive the proportion and how much from the mission? I am trying to get at how you figure this lump sum of $300 that you say you were docked? A As to the amount, what I received from Bethany and what I received from the mission as I said, is about $300, and my loss is about $300.

Q What did you receive from the mission during that period, from October to January? Did you receive any moneys from the mission? A Yes, I haven't the figure of the amount.

Q Can't you recall approximately how much it is? A I know once a donation was raised.

Q How much was that?

Mr. Heisley. Can't you answer. You are taking a great deal of time.

A I don't remember how much it was.

Q Approximate it. A In the neighborhood of $10 or $15. I don't recall.

Q Did you testify how you got this, whether weekly or monthly from the Bethany church? Did you get it in weekly or monthly installments? A It is not weekly or monthly. It is given during the year.

Q How do you know where your living expenses are coming from in regard to this amount that you received from the Bethany Church? A As I say that is just what I am able to raise myself.

Q No, from the Bethany Church. You said the church agreed to give you $300 anyway? A Yes.

Q How do you get that, in weekly or monthly installments? A It is not weekly and it is not regular monthly. It is some time during two months or three months.

Q If that were monthly installments that would be $25 a month? A Yes.

Q Had you been paid up to the time of your injury, was there any money owing to you then or had you been paid up? A I think there was money owing me.

Q How much was owing you in October, 1914? A I can't tell you exactly how much.

Q Did you receive any money from the Bethany Church; church, not the mission, between October 27, 1914, and the 1st of March, 1915? A I believe so.

Q How much? A When Bethany pays she pays $50 at a time.

Q $50 at a time. How many fifties did you receive between the 27th of October and the 1st of March? A I don't remember.

Q Did you receive your regular amount without any deduction on account of your illness from the Bethany Church? A Bethany makes no deduction.

Q So you didn't lose anything by reason of your illness as far as going from the church was concerned, is that right? A I am not certain that the full amount has been paid up.

Q Can you be certain that it was not paid. You don't want to be paid twice. You don't want Mr. Blackmore to pay you something which you have already received from the church? A Not at all. No one is trying to be unfair.

Q That is what I am trying to find out, if you received your full complement of money from the church, you didn't lose anything by reason of your illness as far as your church salary is concerned? A That is what I am saying, I am not certain.

Q You are asking these gentlemen for money and you can't be certain. We want you to be certain. A The full amount has not been paid.

Q How much has been deducted during your illness by reason of your inability to work? A I don't believe there is any deduction.

Q Then, that money is still owing to you? They may be in arrears in their payment, is that what you mean? A Yes.

Q But they would make no deduction by reason of the fact that you were laid aside? A I don't know.

Q You don't know whether you have lost anything from Bethany Church by reason of

your illness or not? A I know I have lost up to the time is concerned.

Q What have you lost from the Bethany Church? A As I have said, I don't know. I can't say there has been any deduction.

Q You don't know that you have suffered any loss so far as the Bethany Church is concerned?

Mr. Heisley. I shall not claim any loss.

Q As far as the mission is concerned how much did you receive from the mission during the period from November or October 27th down to the first of March? A I can't say definitely the amount, but it would not be over $50; $50, $60, something in that neighborhood.

Q Does the mission make deduction from the amount which would be normally coming to you during this period from October to March? A It is not that they make deductions, but unless they raise it I don't get it.

Q So that you were prevented from raising it throughout that period? A Yes.

Q You went to work the 1st of January. How much were you able to raise between the 1st of January when you first started to work or the 1st of March when you were entirely able to go to work again? A I did not fully go back to work the 1st of January. I was still incapacitated but as I said I went to the mission. I was unable to go out and do the work.

Q Were you able to raise any money from the time, as you testified yesterday, that you first went to work in January down to the time in March when you were completely restored? A A little has been raised, but I can't say definitely.

Q You can't say how much? A No.

Q During the two months that you were entirely incapacitated, from the 27th of October to

the 1st of January, the month of November and December, were you able to raise any money? A No.

Q Did the Bethany mission give you any money during that time? A As I have said a donation was given. That is the donation I spoke about.

Q That is the $10 or $15 you mentioned? A Yes.

Q They gave you no money during that period excepting this portion of $10 or $15? A Yes, they gave a little but this was a special amount that they gave.

Q What else was given that you call little beside the donation? A Just the few dollars which we may raise in the Sundays.

Q How much would those average on a Sunday during those two months of November and December, during 1914? A About $1.50 a week.

Q $5 or $6 a month? A Yes.

Q That would be another $10. That would be $25 from the mission during that two months. Does the Bethany mission owe you the balance over and above what you have received during those two months that you were idle?

Mr. Heisley. I submit that is calling for a legal conclusion, whether they owe it as a matter of law.

Mr. Heine. I withdraw it.

Q What, if any, arrangements have you with the Bethany mission in regard to the balance of the money of the $300 or the portion of it that is coming to you during the two months you were idle? A No arrangement was made then.

Q Then you would look to the Bethany Church for any payment of Bethany mission on account

of the balance they didn't pay you during this time you were idle? A No.

Q Do you make any claim against the Bethany mission for that? A No.

Q And the difference between this $50 or $60 and this donation and this Sunday service collection amounting to about $1.50 a Sunday, the difference between what those all total up to and the $25 a month that the Bethany mission paid you is what you have lost? A Yes, and for my lecturing. For example, when I was hurt there was an engagement pending with the Rev. Russell, at Ross Hall.

Q What was that engagement you were to get? A They varied. It depends on the audience but they told me there was quite a large audience awaiting me at the time. They did not learn of the accident and the people were there.

Q You don't know, of course, what the amount of that contribution would have been from that audience? A No.

Q Were you under contract to deliver this lecture? A Yes—well, I would not have you say it was a contract. The bills were out and the time was appointed.

Q What was the time of that lecture set? A I don't remember the date, but it was something in, I think it was a week after I was hurt.

Q Did you have any other appointments for lectures at the time you were hurt? A No, I was to go out to make engagements.

Q That was arranged for, that was in connection with your mission work? A Yes, these are the ways I worked to assist in meeting my expenses.

Q Was this failure to get this appointment with Dr. Russell work that you had from the mission? A Yes.

Q Let me get this clear. Any amount that you received from the mission in excess of $300 is turned over by you to the mission? A No.

Q You get that as profits? A Yes.

Q Anything that you can raise by your mission work in addition to the $300 belongs to you? A Outside what we raise—I must give account of that—is given to the church and that comes under the church body but what I raise as I said in assisting my expenses in going about to lecture—.

Q The lecturing you do in connection with your mission work is not—after it reaches the sum of $300 goes into the church fund? A No, that goes to me.

Q So everything you make in the mission work over $300 goes to you?

Mr. Heisley. No, the lecturing—.

A I said that is what I said, to assist me with the amount that I received from the mission to help me meet my expenses.

Q The lecturing is supported from the mission work? A Yes.

Q So far as the mission work is concerned, the receipts over and above $300 goes back to the church? A I never raised over that amount so I don't know.

Q Had you ever raised the $300 from the mission during the time you have been connected with them? A Yes, raised $300.

Q Was it more than once? A I don't know definitely, but I know we have raised $300 since we have been working. For instance, the last quarter this year I think we raised over $100.

Oravia M. Bonfield, cross.

Q Was this $300 which you say you remember having raised raised during a three months period or is that a total? A Twelve months.

By Mr. Heisley.

Q I understand that as far as the Bethany Church is concerned you have got the $300 from them? A They pay as well as they can.

Q The Bethany Church, you have been paid their $300 which the church has agreed to pay you, didn't you say so awhile ago? A They pay as they can.

Q You don't answer me. Didn't you say a while ago that you had been paid by the Bethany Church the $300 which the church—not the mission—which the church had agreed to pay you? A I said not fully.

Q As to the other $300 which you were to get by your efforts in connection with the efforts of the mission can't you give us a little better idea of how much you were paid from that source from the time of your injury until you resumed your work in March? You must give us some idea. The jury wants to know something about that, whether it was $10 or $100 or whatever it was? A I think I said the amount, received with the donation, didn't exceed $60.

Q That would be from October until March? A Yes, sir.

Q The first of March did you go back to work?

Mr. Heine. He said so yesterday.

Q Was it the first of March or when? A Yes, in March I went back.

Q First, middle or when? A The early part of March.

Q Four months then. Your loss would have been $40 or $50? A Yes.

Q In addition to that you have lost, as I understand, anything you would have made by lecturing, is that true? A Yes, sir.

Q How much had you made by lecturing in the year before?

Mr. Heine. I object to that as irrevelant, incompetent and immaterial.

The Court. I think you ought to get his average.

Q What did you average earning from each year for your lectures, say for three years before, immediately before you were hurt? A Between $600 and $700.

Q You made that each year or do you mean that the three years. I am asking you the average for each year? A The average for each year would be about $600 including—

Q Including what? A The donation which I received.

Q I want to know this, if you can tell us, what you made on an average each year simply and solely from lecturing or nothing else, whether it is $50, $200 or $500? A Between $50 and $60.

Q A year? A Yes.

ROBERT WATKINS, sworn in behalf of plaintiff.

Direct examination by Mr. Heisley.

Q Mr. Watkins, what business are you in? A I am now working at the Chalmers place.

Q An automobile? A Yes.

Q Where did you work in October, 1914.? A Blackmores.

Q Blackmore's building? A Yes, sir.

Q Who employed you there? A J. E. Blackmore.

Q The gentleman sitting over here? A Yes, sir.

Q What kind of a business did Mr. Blackmore carry on?

Mr. Heine. I object to that on the ground this witness is not in a position to testify.

The Court. No, I do not suppose he can tell you that. He can tell you why he was there.

Mr. Heisley. Can he tell whether it is a store or a church or a saloon?

The Court. That is proper; no objection to that.

Q What kind of business did he carry on there? A Store.

Q What kind of a store? A Photo and art supplies.

Q You mean photographic and art supplies? A Yes.

Q In what portion of that building did he conduct this business? A The first floor.

Q As you come in from the street? A As you come in from the street.

Q Were you at this store on the day of the accident? A Yes.

Q Were you there at the time of the accident, rather? A Yes, sir.

Q Did you see this boy, of whom Mr. Bonfield has spoken yesterday, at that time? A No, sir, I didn't see him.

Q Do you know whether or not Mr. Blackmore was in the building at the time of the accident? A He was.

Q Where was he? A At the other end.

Q Of the store? A Yes, sir.

Q Was there anybody in the front entrance that you know of? A Not as I know of.

Q Where were you? A I was at the other end of the store.

Q Back where Mr. Blackmore was? A Yes.

Q Do you know who this boy was whom Bonfield described yesterday?

Mr. Martin. I object. He said he wasn't there and didn't see him.

Q How soon after the accident did you see the boy? A I saw the boy right with the accident.

Mr. Martin. I object. I object to saying he saw the boy. There isn't any evidence at all that any boy he saw afterward was the boy that the plaintiff has been testifying about.

Q Had you seen this boy there before? A Yes, sir, I have.

Q How old a boy was he? A About fourteen or fifteen years old.

Q Had you ever seen him running that elevator before? A Yes, I have.

Mr. Heine. I object to that as incompetent and immaterial unless connected with this defendant.

Mr. Heisley. I am going to connect him.

Q How often had you seen him operating this elevator before? A I do not know.

Q Many times or only one or two times? A Many times.

Q Had you ever seen him operating it when Mr. Blackmore was there? A Yes, sir, I have.

Q More than once? A Yes, sir.

Q Have you ever seen people taken up on this elevator? A Yes, sir.

Q More than once? A Yes, sir.

Q Was or was it not the practice to take them up?

Mr. Heine. I object to that. That is conclusion.

The Court. Yes.

Q How often did you see him take people up on that? A I have often. I don't know how many times.

Q Try to give us your best recollection as to how frequently, how often you would see people coming up on this elevator; I mean, whether you had seen them carried up every day or a year, or almost every day, every week or every month, or how often?

Mr. Heine. I object to that on the ground the witness has already answered that he does not know how often. I think the form of the question is improper and leading and suggesting to the witness what counsel wants him to say.

The Court. I will allow that.

Counsel for defendant objects to this ruling of the Court.

Objection noted as ground of appeal.

A Every day.

Q How long did you work there? A I worked there one year and nine months.

Q When these people had been carried up on this elevator was or was not Blackmore in the store? A Not all the time.

Q Was he sometimes? A Sometimes.

Q How long did you work there? A A year and nine months.

Q And did or did not this practice of carrying up people on this elevator exist during all that time that you worked there or only during part of the time?

Mr. Heine. I object to that. There is no evidence that there was a practice, and it calls for a conclusion and the statement is an imperfect statement of the evidence.

The Court. Yes.

Q Did they carry people on this elevator, was that all of the time that you worked for Mr. Blackmore or only part of the time? A Pretty near all the time.

Q Who else ran this elevator, if you know? A Some tenants upstairs.

Q There were tenants on the upper floor, were there? A Yes, sir.

Q You heard of the accident. How soon after it occurred if you know? A Right then.

Q What called your attention to the fact that there had been an accident? A By him hollering.

Q Who hollered? A Mr. Bonfield.

Q Mr. Bonfield hollered? A Yes.

Q What did you do then? A I ran there right away.

Q What did you find? A Him lying downstairs in the elevator shaft.

Q Did you see anybody else afterwards around there? A No one else only the boy.

Q Which boy was this? A The boy that opened the door.

Mr. Heine. I move to strike that out.

The Court. Yes, strike that out.

Q Was or was it not the boy who you have been telling us this morning you had seen frequently running the elevator? A Yes, sir, same boy.

Q What was he doing? A He stood there.

Mr. Heine. I object to that unless he fixes the time.

The Court. He said he went to the elevator.

Q You found Mr. Bonfield down in the cellar? A In the cellar.

Q Where was the elevator? A In the cellar.

Q Where was the elevator? A Upstairs.

Q Was the elevator, was the door to the elevator shaft open or closed? A Closed as far as I could see.

Q I want you to tell what you know, whether you are sure about it?

Mr. Heine. He said so.

Q Are you sure it was closed or not?

Mr. Heine. The witness has said it was closed and that is important. I don't think counsel ought to suggest to the witness to change his answer.

The Court. The witness says it was closed.

Q Are you sure about whether it was closed or open? A At what time?

Mr. Heine. I move—the witness has specifically said he thought that door was closed at this time and I don't think counsel ought to be allowed to switch him around.

Mr. Heisley. Question withdrawn.

Q When you got to the elevator shaft can you tell us whether or not at that time the door to the shaft was open or closed?

Mr. Heine. I object on the ground the witness has already stated.

The Court. I will allow that question.

Counsel for defendant objects to this ruling of the Court.

Objection noted as ground of appeal.

A It was open.

Q What did you mean awhile ago when you said it was closed?

Mr. Heine. I object to what the witness has meant as calling for a conclusion. The jury can judge what he meant. The witness ought not to be allowed to color his testimony in that way.

Mr. Heisley. I object to his characterizing the statement.

Objection withdrawn.

Q What did you mean as you said awhile ago that the door was closed? A I don't understand you.

Q Did you aid Mr. Bonfield? A I did.

Q What did you do? A I went down in and got him up out of the cellar and brought him up on the first floor.

Q Mr. Blackmore helped you? A No, sir.

Q Mr. Blackmore come up there at all? A He came up there later, yes, sir.

Q After what? A After I had him up he was there.

Q You got him upstairs on the store floor alone, did you? A Yes, sir.

Q Nobody helped you? A No, sir.

Q Could he walk? A No, sir.

Q How did you get him up? A On the elevator.

Q You got the elevator down and took him up? A Yes.

Q How was that place at that time as to whether it was bright or dark? A Well, it was dim.

Q At the time of the elevator shaft was there any glass over the top way up on the building, if you know? A Yes, sir, it was.

Q Is that the only light that the elevator shaft got? A Well, it was glass in the door.

Q In the door of the elevator? A Yes.

Q When the elevator was above this first floor would it get any light from the windows in the elevator? A No, sir, none.

Q How would the place in the elevator shaft right by the first floor be as regarding light or darkness when the elevator was above the first floor?

Mr. Heine. I object to that unless the time of the accident is referred to.

Mr. Heisley. I am referring to that or at that time.

Q Do you understand the question?

(Question withdrawn.)

Q When the elevator was above this first floor would the fact that the elevator was above the first floor have any effect by making it darker or lighter below the elevator? A It did.

Q What did it do? A It made it dim there when it was above it.

Q Was or was not the elevator shaft opposite this first floor, the floor that Mr. Blackmore

occupied, brighter or dimmer than the store itself through which it came? A Dimmer.

Q Much dimmer? A Quite a little.

Q Were there any windows back there by the elevator shaft that allowed light to come there at that time?

Mr. Heine. I object to that.

The Court. You may answer if you know.

A There was no light.

Q How long is that store from the street to the back? A It runs one block through.

Q How far from the front store is the elevator shaft? A About 25 or 30 feet.

Q You were at the back of the store when this accident happened? A I was.

Q How long is that block, the depth of the store? A I can't tell you.

Q 200 feet? A I don't know.

Q Can't you fix the distance of that? A Not very well.

Q How did you fix the 25 feet from the front of the store? A Well, because I was used to walking that.

Q How many times 25 feet is the rest of the store?; four times or five times? A Well, about five times I should say.

Q So you were 125 feet away from this elevator shaft at the time this accident happened? A No, I wasn't 125 feet away.

Q How many feet were you? A About 100 feet away.

Q There are a lot of packing boxes and stuff piled up in the store? A There wasn't.

Q Is there a counter running the whole length of the store? A There is.

Q You were behind the counter? A I was not.

Q Which way were you facing, the front of the store or back? A I was facing the side.

Q Which side, right or left as you face the front of the store, toward the counter or away from the counter? A Facing the counter.

Q That brought your right hand side toward the front of the store, did it? A Yes.

Q You heard Mr. Bonfield holler? A I did.

Q That is when you knew an accident had happened? A I did.

Q You were the janitor? A I was.

Q And Mr. Blackmore used more than one floor of the building? A Mr. Blackmore's business?

Q In his business he used more than one floor? A Only that floor.

Q Who was on the second floor? A No one was on the second floor.

Q Who was on the third floor? A No one.

Q Who was on the fourth floor? A No one.

Q Who was on the fifth floor? A Mr. Bergman was on the fifth floor.

Q Was he the only other tenant in that building? A That is all.

Q Was there anyone there? A No one.

Q So when you told Judge Heisley there were other tenants in the building you didn't tell the truth? A I said there were tenants in that building.

Q You said tenants when you meant tenant? A Yes, sir.

Q You know the difference between the singular and the plural. Did you mean to give a wrong impression? A No.

Q Didn't Blackmore have any of his things, any of his merchandise in any of the other floors

of the store? A Not at that time, only in the basement.

Q And you ran the elevator up and down as he told you with bills and things and supplies? A I did.

Q There was a light in the basement? A There was a dim light in the basement.

Q What was it, electric or oil? A Gas.

Q That was lighted at the time of the accident when you went down there and saw Mr. Bonfield at the bottom of the shaft? A I did.

Q It was lighted when you went out and got Mr. Bonfield out of the bottom of the shaft? A It was lighted.

Q And the people who went up and down that elevator were Mr. Blackmore's clerks? A Sir?

Q Can't you hear me? The people that went up and down on this elevator were Mr. Blackmore's employees? A Not only his employees. It was the tenant upstairs.

Q That is Mr. Bergman? A Mr. Bergman, yes.

Q Mr. Bergman went up and down that you saw? A Some bunches of his employees.

Q You saw Mr. Bergman's merchandise, packages for him as photographer? A I did.

Q Did you ever take them up at Mr. Blackmore's direction? A I did.

Q And Mr. Blackmore received a pile of stuff for Mr. Bergman and you took it upstairs? A I did.

Q How many other employees are there of Mr. Blackmore's? A At that time?

Q Yes. A There were two more.

Q Did you ever see him tell anyone of them to take merchandise upstairs belonging to him or Mr. Bergman, either one? A They did.

Q Either one of these two employees? A I did not.

Q Never heard him tell that? A No, I didn't.

Q Mr. Blackmore had no merchandise at that time, the time of the accident, October, 1914, had no merchandise or materials on the other floors? They were vacant? A They were vacant.

Q Excepting all that stuff of Mr. Bergman's floor up top? A On the sixth floor Mr. Blackmore has some merchandise up there.

Q Above Mr. Bergman? A Above Mr. Bergman.

Q But there was nobody else in the building excepting Mr. Bergman on those six floors? A That is all.

Q Mr. Blackmore didn't have any goods for sale on the second, third or fourth floor, did he? A No, sir.

Q So those people you saw going up there every day were either yourself or Mr. Blackmore's other two employees or Mr. Bergman? A That is right.

Cross examination by Mr. Martin.

Q You were in Mr. Bergman's floor, were you? A I was.

Q Were you there as janitor frequently? A I didn't have anything to do with Mr. Bergman's floor; only went there to carry some things or take a message up there.

Q Did Mr. Bergman, did he have a store at which to sell articles? A No, he did not; not as I know of.

Q Robert, did not you ever see any people having business with Mr. Bergman? A I did.

Q Go up in this elevator?

Robert Watkins, cross.

Mr. Heine. I object to that as calling for a conclusion.

The Court. He cannot tell that.

Q Did you ever see any person other than Blackmore or Bergman or their employees come in from the street and go up to Bergman's floor in this elevator? A You mean outsiders?

Q Yes. A Yes, I have.

Q More than once? A More than once.

Q Frequently or not?

Mr. Heine. I object to that as a conclusion.

A Once in awhile.

By the Court.

Q How did you get your elevator downstairs without striking this man when he was on the bottom? A I pulled him out first.

Q How did you get down? A I went down the stairway.

Q When you got down there where was he? A He was laying down there in the elevator shaft.

Q Right at the bottom of the elevator shaft? A He was laying over a kind of a pipe down there.

Q You pulled him aside and took the elevator down? A Yes.

By Mr. Martin.

Q When you brought the elevator down what did you do to bring it down? A I pulled the cable there, pulled the cable up.

Q That is, there is a cable runs up and down in the shaft? A Runs up and down in the shaft.

Q To move the elevator you have to pull the cable? A Have to pull the cable.

Q To start the elevator, no matter where it is you have to pull the cable from where it is to somewhere? A From somewhere, whatever floor you are on.

Q You pull the cable and that moves the elevator? A That moves the elevator.

Q Where was the cable, on which side of the shaft? A Left hand side going in.

Q That is the side towards the street? A Towards the street.

Q As you come in from the street and go to the elevator go back along the store to the elevator, when you reach the elevator which way do you turn to face it; do you turn to the right or to the left? A You turn to the left facing the elevator.

Q You turn to the left? A Turn to the left.

Q Then when you are facing the elevator if the door is shut which way does the door move to open? A You pull the door to the left.

Q The door goes to the left back towards the street? A Yes, back towards the street.

Q Then, when you reach in the elevator shaft which side is the rope, to your left, or to your right? A To your left.

Q Towards the street? A Towards the street.

ALBERT N. STUBBLEBINE, confirmed in behalf of plaintiff.

Direct examination by Mr. Heisley.

Q Mr. Stubblebine, what is your occupation? A A clergyman, Presbyterian church.

Q It is a white church in this city? A White church, yes.

Q You have a colored mission associated with it? A I have.

Q How long have you been in this city? A Eleven years, I believe, it is next September.

Q In charge of this same church? A In charge of this same church.

Q Where is the church located? A Corner of Spruce and Charlton, Newark.

Q Do you know Rev. Mr. Bonfield? A I do.

Q How long have you know him? A More than eight years; I should judge about nine years.

Q Do you know whether or not he has been in the practice of lecturing and engaging in church work during that time? A I do.

Q Did he have an arrangement with your church? A Yes, sir, my session.

Q The Presbyterian church is governed by a session? A Governed by a session of what we call ruling elders. I am moderator of the session.

Q Do you recall the fact that Mr. Bonfield was injured in the year of 1914? A I recall that he reported to me that he had fallen down a shaft in Mr. Blackmore's building.

Q Did you see any effects at that time that he was suffering from injury of any kind? A Well, I visited him in the hospital.

Q Which hospital? A In the City Hospital and also in his home after he was returned there, and from every appearance Mr. Bonfield had been suffering very greatly.

Mr. Heine. I move to strike out what the appearance was.

The Court. Yes.

A Mr. Bonfield could not move his arm when I saw him. His arm, the first time, was bandaged to his chest and after that it was in like manner and at a number of times in my investigation of his condition he could hardly use his arm at all and complained of suffering in his back, all through his back and his neck and his head and also his inability to sleep at night.

Q How long did that continue? A That I am not able to say; considerable time. He was out of his work in connection with Bethany for a number of months.

Q Did you have any physician attend him? A After he had come from the hospital and seemed to show very little progress I advised him to go to Dr. Robertson, who is chief of the staff of our Presbyterian Hospital with which I am associated and I suggested his going to Dr. Robertson. I don't know whether he went to the hospital or not, but I do know he went to his home at frequent intervals for some kind of a treatment which I know nothing about.

Q Have you ever been in this Blackmore building? A I have been there several times.

Q How soon were you there after this accident, which was on the 27th of March, 1914? A I can't recall the exact time but I recall calling on Mr. Blackmore shortly after the accident and talking to him in regard to it.

Q How soon after? A I can't say very accurately. It was after I had discovered Mr. Bonfield's condition and had received his statement. It was surely after the accident.

Q We want to get some definite idea. Was it a few days or few weeks? A I have no way of fixing it but it was near the accident. I

should say—let it go at a week or more, something like that.

Q Week or ten days? A Something like that. It may have been more or less.

Q Did you see this elevator? A I saw where it was located.

Q Did you see the elevator shaft? A I saw where the shaft was but not to look into it at all.

Q How did you approach the elevator shaft? A I came in from the—

Mr. Heine. I object to that as immaterial.

A I came in from the opposite entrance.

Q Bank street? A The Bank street entrance. I came in from the Bank street entrance. This door, I had been in the other way before, but I came in the Bank street entrance this time and met some gentleman—I don't know who it was—who referred me back to Mr. Blackmore. He was in about the middle part of the store. We talked about it. The conversation I forget at the present time, and then went back and saw where the elevator was located, which would be on the Broad street side, if I remember rightly, of the street. I haven't been in to refresh my memory, so—

Q What would you say the condition of light was, briefly, immediately around the elevator shaft and the condition of light around the Academy street entrance of the store at the time that you called there, a week or ten days after this accident?

Mr. Heine. I object to that unless the condition of time and day and weather conditions are similar to those of the date of the accident.

The Court. No, I think I will allow that.

Counsel for defendant objects to this ruling of the Court.

Objection noted as ground of appeal.

A The impression on my mind at the time and other times that the store has been exceedingly dark for a public business place.

Mr. Heine. I move to strike that out as a conclusion of this witness.

The Court. Yes.

A The store has been—

Mr. Heine. I object to the witness volunteering an answer.

The Court. He can answer.

Counsel for defendant objects to this ruling of the Court.

Objection noted as ground of appeal.

Q (Question repeated.) A The store was very dim.

Q What would you say as to the degree of light around the elevator and the degree of light at the entrance of the store from Academy street at the time that you visited a week or ten days after the accident? A Considerably darker.

Q Darker where? A Around the elevator as you go into the store from either entrance.

Q How was the store lighted? Would you say "Well lighted," or "Not very brightly lighted"?

Mr. Heine. I object to that as calling for a conclusion.

The Court. Objection sustained.

PLAINTIFF RESTS.

Motion for Non-suit.

The Court. I would like to hear you gentlemen on the question of this ordinance and that resolution, which you spoke of yesterday and which I admitted subject to any objection you wanted to make.

In the first place, you object to the ordinance on the ground that you thought the ordinances were improperly passed, they had no authority to pass on them. I want to know what authority you think this Court has to pass on the validity of an ordinance. That is the first question.

Mr. Martin. I have not any precise authority to submit on that question. In this case this Court would not directly pass upon the validity of an ordinance.

The Court. I shall allow it to stand.

Mr. Heine. I respectfully move for a nonsuit on the ground that the negligence of the defendant Blackmore, even if proved as charged by the plaintiff, was not the proximate cause of the injury sustained:

Cole v. *Gem Saving & Loan Society,* 59 C. C. A. 593 (124 Fed. 113).

Board of Trade v. *Cralle* (Sup. Ct. of App. Va.) 63 S. E. Rep. 995.

Claypool v. *Wigmore,* 34 Ind. App. 35.

On the further ground that there is no negligence shown on the part of defendant Blackmore toward the plaintiff who was a licensee by sufferance:

Ryerson v. *Bathgate,* 67 N. J. L. 334.

Farris v. *Hoberg,* 134 Ind. 269.

Mallow v. *New York Real Estate Exchange,* 156 N. Y. 205.

O'Brien v. *Western Steel Company,* 100 Mo. 182.

Wise v. *Ackerman,* 76 Md. 375.

McDonough v. *Hodd Electric Company,* 111 App. Div. (N. Y.) 585.

And on the further ground that the plaintiff failed to establish the fact that the injury suffered was one which might have been reasonably anticipated by defendant Blackmore, and this is not to be judged in the light of subsequent events, but by what the defendant Blackmore should have anticipated, would be the usual course of events and ordinary care at the time of the accident:

Empire Company v. *Atkinson, Etc., Co.,* 135 Fed. Rep. 135.

Cooley on Torts (3rd Edition) page 73.

On the further grounds that the plaintiff was guilty of contributory negligence.

Baker v. *Deane,* 69 Ill., App. 613.

Urban v. *Focht.* (Pa.) 81 Atl. 55-56.

Mill v. *Brandes,* (Pa.) 83 Atl. 710.

Mr. Martin. I ask for a non-suit as to the defendant Bergman, on the ground stated by counsel for the other defendant and on the further ground that in this case there is no evidence whatever to connect the defendant Bergman with the alleged negligence and there is no evidence of any invitation on the part of the defendant Bergman. Although the plaintiff had to go to the premises of the plaintiff Bergman the plaintiff on his own case shows that the defendant, Bergman, did not conduct a store and had nothing to sell and makes it absolutely clear

that the plaintiff had no business reasons for going to the place of the defendant Bergman.

I do not suppose the Court wishes me to repeat any of the argument of Mr. Heine's motion. May I have the benefit of that?

The Court. Yes.

Mr. Heisley. I do not oppose Mr. Martin's motion to non-suit as to Mr. Bergman.

The Court. I shall refuse the motion as far as Mr. Blackmore is concerned and grant the motion as far as Mr. Bergman is concerned.

Mr. Heine. I object to this ruling of the Court.

Objection noted as ground of appeal.

J. EDWARD BLACKMORE, sworn in his own behalf.

Direct examination by Mr. Heine.

Q Mr. Blackmore, this elevator on your premises was used as a freight elevator? A Yes, sir.

Mr. Heisley. I object to that.

Mr. Heine. He has answered it.

Q You have made a lease to Mr. Bergman in this case. I show you this paper and ask you if that is a lease to Bergman? A Yes, has my signature.

Q Do you know Bergman's signature? A Yes.

Q Is that it? A Yes, and that is my writing there.

Mr. Heisley. Let me look at it and I will admit it if it has any relevancy.

Mr. Heine. I offer this.

Admitted in evidence and marked Exhibit D 1.

Q Did you on any occasion give permission to Mr. Bergman, your tenant, to take up merchandise in this elevator? A Why, I can't say that I gave it to him specifically, but I allowed him to use it.

Q Once in a while when he had merchandise to take up? A Any time he had anything to take up I made no objection to using it reasonably.

Q There was no provision that you were to give him any elevator service? A Yes, generally.

Q Did you see the plaintiff, Mr. Bonfield, shortly after the accident? A Yes, sir.

Q Did you see the young lad who was in the premises there at the time of the accident? A Yes, sir.

Q Was that young lad in your employ? A The boy that undertook to take him upstairs, do you mean?

Q No, I mean the other boy? A The colored boy?

Q I don't mean the colored boy, the white boy, was he in your employ? A No, he wasn't in my employ.

Cross examination by Mr. Heisley.

Q How long had you known that boy? A Why, I didn't know him at all.

Q He had been working around there for a long time? A I don't know how long he had been working there.

Q Had been, as a matter of fact, for some time? A He had been up in Mr. Bergman's place, but I paid no attention to Mr. Bergman's help.

Q He would go up and down in the elevator? A I believe he did. I can't recall that I ever saw him.

Q As a matter of fact, you allowed anybody in that building to use that elevator if they wanted to? A I many times objected to anybody using it.

Q As a matter of fact, you did allow a great many people to use it? A Not a great many. I allowed Mr. Bergman or his employees.

Q Didn't you allow other people to use it? A Not knowingly.

Q Didn't you see other people going up and down that elevator who were not Bergman or Bergman's employees? A I don't recall anybody going up there who had no connection with Mr. Bergman.

Q You won't say they didn't? A I didn't see everybody go up and down. I wasn't there all the time.

Q You kind of let the old elevator run itself? A No, the elevator would not run itself.

Q You didn't think enough of it to put anybody in charge of it? A I thought a good deal of it. I had to pay for the keep of it.

Q You didn't think enough of it to put somebody in charge of the elevator, to put somebody in charge of it? A I never had.

Q Answer the question. Qou never thought enough of it to put somebody in charge of it for the purpose of operating it? A I never required the use of it enough for that.

Mr. Heisley. I move to strike that out.

Mr. Heine. I move to let it stand.

The Court. The answer will stand.

Q Will you answer yes or no. You never thought enough of it to put somebody in charge of it for the purpose of operating it? A I never placed any one particular person in charge.

Q Did you place anyone in general in charge of it? A I was in general charge of it myself.

Q Took people up and down on it? A Sometimes, people with whom I was doing business. Took my own family up many a time.

Q You didn't know as a matter of fact that you are required under the ordinance of this city and under the regulations of the building department to take out a license for that elevator, did you? A No, sir, never was brought to my attention, in any way, shape or form.

Q You never heard until after this accident of an ordinance of this city that says that no person shall employ or permit any person to be in charge of running any passenger elevator who does not possess the qualifications prescribed therefor? A I never knew that law until I heard you read it today.

Q You did permit this fourteen year old boy to run this elevator on occasions? A I never permitted him to do it on any occasion.

Q Did you tell him not to? A I never told him because I could not.

Q You saw him do it? A I can't say positively I ever saw him do it.

Q You won't say you did see him do it? A I won't say that.

DEFENDANT RESTS.

Mr. Heine. I now renew my motion on the grounds previously stated for a direction of verdict and on the ground that the weight of the evidence is sufficient denial by placing the status of this boy as a volunteer and on the further grounds there is an intervening cause in this case which comes in between any negligence by reason of an ordinance and breaks the chain of accusations and I submit that contributory negligence on the whole case has been affirmatively proved and I move for a direction of verdict in favor of the defendant.

The Court. I shall refuse your motion.

Objection noted as ground of appeal.

Charge to Jury.

The Court charges the jury as follows:

CUTLER, *J.*

Gentlemen of the Jury. The plaintiff in this action instituted his suit to recover from J. Edward Blackmore and William Bergman damages for injuries which he received on the 27th day of October, 1914. The evidence having failed to connect the defendant Bergman with the accident a non-suit was granted so far as he was concerned and you, gentlemen, have simply to deal with the remaining defendant, J. Edward Blackmore.

The circumstances are briefly these:

On the day in question this plaintiff went to the store operated by Blackmore on a lawful errand. Upon entering the store he met a young

boy some fourteen years of age who went with him to the elevator. The door of the elevator was open or rather the door to the elevator shaft was opened; he stepped inside and fell to the bottom of the shaft and was injured and asks damages at your hands.

Now, it is obligatory on the plaintiff to establish by a preponderance of the evidence that the defendant was negligent. This case rests entirely on negligence. If the defendant was not negligent in the performance of some duty that the law casts upon him there can be no recovery so it is important that you should consider all the evidence that has been presented in this case to determine whether or not the plaintiff has established by a preponderance of the evidence the negligence of this defendant. The defendant, Blackmore, operated this store and held out an invitation to the public to enter his store and he was bound to use that reasonable care, or rather to see that reasonable care was exercised to have the store reasonably fit and safe for the uses which he had invited others to make of it. In other words, it was his duty to see that the store was reasonably fit and safe for the persons that entered.

In this store was an elevator and he was bound to see that it was reasonably protected so that persons in said store would not fall down the elevator shaft and be injured. As I have said the sole question in this case is whether the defendant has been negligent in the duties which the law casts upon him. You have heard how the elevator shaft was enclosed and that the only way of entering it from the first floor was by a door and that that door was closed when the plaintiff entered the building. You are to

say from this evidence whether or not the defendant, who owned the building and the elevator, used proper care in protecting the shaft of that elevator. That is one of the questions which you are to meet and are to decide by the evidence. But the plaintiff contends further that the defendant was also negligent in the operation of this elevator; that he had failed to properly obey the rules which have been promulgated by the superintendent of buildings of the City of Newark, and that by reason of that negligence there should be a recovery in this case.

Now, some time ago the Mayor and Common Council of the City of Newark passed an ordinance, which, among other things, provided: "That the superintendent of buildings shall cause an inspection of elevators carrying passengers or employees, to be made at least once every six months and shall make regulations for the inspection, installation, alteration and operation of such elevators and shall also make regulations for the installation, alteration and operation of freight elevators with a view to safety; and shall also prescribe suitable qualifications for persons who are placed in charge of the running of passenger or freight elevators. No person shall employ or permit any person to be in charge of running any passenger elevator who does not possess the qualifications prescribed therefor."

In pursuance of this ordinance the superintendent of buildings of the City of Newark promulgated certain rules. Among these was a rule that elevators should be in charge of a competent operator of reliable and industrious habits not less than eighteen years of age with at least one week's experience in running an elevator under the instruction of a competent person.

The plaintiff contends that this was not done and that therefore he has an action against the defendant. The passage of this ordinance does not give the plaintiff any right to recover in this action except through the theory of negligence. It is upon the element of discoverable danger that public statutes or ordinances act, and they do this not by giving to the plaintiff a right of action he did not have before, but by their operation upon what might be called the common law conscience of the defendant, better known to us in its personified form of "the ordinary prudent man," the familiar fiction designed by the common law to aid juries, when deciding what was the proper thing for a man to do, to lose sight of the personal point of view of that particular man and to base their judgment upon a general standard which in the final assize is what the jury itself thinks was the proper thing to do.

In other words, it is inconsistent with ordinary prudence for an individual to set up his private judgment against that of the lawfully constituted public authority. We must assume, therefore, that the ordinary prudent man would not do such a thing since to do so would be to change his entire nature and forego the very traits that brought him into existence. He would, in fine, cease to be the pattern man he must continue to be in order to be at all.

Upon common law principles, therefore, when the legislature has by public statute established a certain standard of conduct in order to prevent a danger that it foresaw, it has in this regard forewarned the "ordinary prudent man" and through him the defendant in a civil action, whose conduct must always coincide with this common law criterion. Such danger, therefore,

does not have to be proved by the plaintiff, since there is no longer room for a reasonable difference of opinion, for by his breach of the statute the defendant, through his common law conscience, is charged with knowledge that if injury ensues he will have acted at his peril.

So that the question still remains whether or not this defendant in failing to have a man to operate this elevator was negligent, and whether that negligence was the proximate cause of the accident.

Now, a man may be negligent without being liable for injury or damages and you have to go a step further than saying in this case that the defendant was negligent. You have to say that the negligence was the proximate cause of the accident which resulted in the injury to this plaintiff.

Now, you may consider another phase of the case, because you must take into consideration all of the evidence that has been offered before you: The boy who invited, as they claim, this plaintiff to enter the building. If this boy was in the employ of Mr. Blackmore and was acting under the scope of his authority when he opened the door of the elevator and invited the plaintiff to enter, Mr. Blackmore through the act of his agent would be liable, unless the plaintiff was guilty of contributory negligence, but if you come to the conclusion that this boy was not in the employ of Mr. Blackmore; that Mr. Blackmore had not allowed him to run this elevator and did not hold him out to the public as one of his employes. It makes no difference how he was there—if he was not there with the consent or by the direct authority of Mr. Blackmore whatever

he did would not bind Mr. Blackmore in reference to his action on that day.

Now, gentlemen, if you decide (taking into consideration the ordinance, what this man did, what the defendant did, what he failed to do) that the accident was not caused by any improper operation of the elevator; the elevator did not go up too fast and the man was not thrown out, the boy did not shut the door too quick and shut the man in the door, the accident was not through the improper operation of the elevator, but the accident was caused because the elevator was not there when the man was supposed to step in it, you are to determine was the defendant guilty of negligence. If he was not or if he was guilty, was not the approximate cause of the accident, the plaintiff cannot recover but if he was guilty of negligence and that negligence was the proximate cause of the accident then there can be a recovery and should be a recovery in this case unless the plaintiff himself was negligent and contributed to the accident.

Now, there comes another question, gentlemen, entirely a question of fact for you to determine. You will recollect that this boy was a small boy fourteen years of age and you have the right to consider whether or not a boy of that age would have been in charge of that elevator and whether this man when he came in would not be aware that such a boy would not be the person in charge of an elevator of that character. You are to take into consideration that when the elevator door was opened there was not anything said. The plaintiff does not say he was looking at the floor and looking down but simply walked in, and his eyes in front of him when he fell. Now, gentlemen, if you believe that he used the

ordinary caution of a reasonably prudent man, if he did on that occasion what a reasonably prudent man would have done, walked into that elevator and was not guilty of contributory negligence and that the defendant, as I have said, was guilty of negligence which was the cause of the accident, then your verdict should be for the plaintiff; if not, it should be for the defendant. If you come to the conclusion that it is for the plaintiff then you come to another question, and that is the question of damages. He is entitled to all he has lost by reason of his injury. As I understand it from the testimony, but you are to be the sole judge of all this evidence, he lost from $50 to $60 from the salary which he would otherwise have received from the mission. He lost from $50 to $60 from the amount he would have earned ordinarily from giving certain lectures. That, I understand, is all the money that he actually lost, but he is entitled to something more, if he is entitled to anything, and that he is entitled to something for the pain and suffering which he endured and for such pain and suffering he may hereafter endure.

Now, pain and suffering cannot be weighed out the same as you would weigh out any merchandise. But you, gentlemen, by your own good common sense have to fix this sum in dollars and cents that you award this man for his pain and suffering which he underwent. There is not any permanent injury so that is out of the case. The question is how much suffering he has undergone and what he will undergo in the future. For that he is entitled to compensation if entitled to any compensation at all.

You are to take this case, consider all the evidence that has been offered in this case, then

determine whether or not there was negligence and if there has been negligence then whether it was the approximate cause of the accident and whether the plaintiff was guilty of contributory negligence. If that was so then there cannot be any recovery. But while the plaintiff must establish in the first place the negligence of the defendant the defendant must establish the contributory negligence of the plaintiff. The burden of proving contributory negligence rests upon the defendant in this case. If you find the plaintiff's injuries were the result of the negligence of the defendant and that he was not guilty of contributory negligence he is entitled to a verdict; if not, the defendant is entitled to the verdict.

Take this case; treat it without prejudice; treat it just exactly as you would any other case; give it your careful consideration and then make any such verdict as you think the evidence warrants after applying these rules of law.

I refuse to charge the plaintiff's requests to charge in the wording requested, but I think I have covered them in a different way.

THE JURY RETIRES.

Plaintiff's counsel requests the Court to charge the jury as follows:

(1) That the municipal regulations of the City of Newark required this elevator to be in charge of a competent operator of reliable and industrious habits, not less than eighteen years of age, and if the jury finds that such elevator was not in the charge of such person at said time, and the absence of such person was the proximate cause of the accident, then the defendant was

Exhibit D. 1.

guilty of neglect, and must respond in damages, unless it appear that the plaintiff was guilty of contributory neglect.

(2) The burden of proving contributory neglect is upon the defendant.

The jury returned a verdict in favor of the plaintiff and against the defendant Blackmore in the sum of four hundred ($400) dollars.

EXHIBIT D. 1.

Lease With Water Clause.

From J. E. Blackmore to A. Barber W. Bergman, from April 1st, 1914, to April 1st, 1916.

This indenture made this seventh day of April, in the year One Thousand Nine Hundred and Fourteen between J. E. Blackmore of the City of Newark, in the County of Essex, and State of New Jersey of the First Part, and Barber Bergman, of the City of Newark, in the County of Essex, and State of New Jersey, of the Second Part, witnesseth, that the said Party of the First Part do hereby demise and lease unto the said Party of Second Part, all the rooms on the fifth floor of the Blackmore building, at 60 Academy street, in the City of Newark, N. J., with the appurtenances and the sole and uninterrupted use and occupation thereof (except as hereinafter mentioned) for the term of two years from the first day of April, nineteen hundred and fourteen, for the yearly rent of four hundred and eighty dollars payable monthly in advance.

And the said Party of the Second Part doth hereby agree to pay to the said Party of the First Part, heirs, assigns, agents or attorneys,

Exhibit D. 1.

the said yearly rent of four hundred and eighty dollars at the time and in the manner aforesaid.

And the said Party of the Second Part doth hereby promise and agree that they will not Re-Let or Under-Let the whole or any part of said premises, nor assign this lease, nor use or permit any part thereof to be used for any other purpose than photo finishing studio, without the written consent of the said Party of the First Part, his heirs, assigns, agents or attorneys, under the penalty of forfeiture and damages; that the said Party of the First Part, his heirs, assigns, agents or attorneys may enter into and upon said premises at reasonable hours in the daytime to examine the same, or to make such repairs or alterations therein as shall be necessary for the preservation thereof; and to exhibit them at any time during the last three months of the said Term from Ten o'clock in the morning to Five o'clock in the afternoon (Sunday excepted) to any person or persons; and put up notices "To Let" or "For Sale," on the outside wall thereof. If the said premises shall become vacant, or be deserted during said term, the said Party of the Second Part, doth hereby authorize the said Party of the First Part, his heirs, assigns, agents or attorneys, to re-enter the same at his option, and Re-Let them and receive and apply the rent so received to the payment of the rent due by these present.

And the said Party of the Second Part doth further agree to keep the premises in as good repair as the same shall be at the commencement of said term (wear and tear arising from a reasonable use of the same and damages by the elements excepted); and at the expiration of said term to yield up the peaceable possession thereof

Exhibit D. 1.

to the said Party of the First Part, his heirs, assigns, agents or attorneys.

And the said Party of the Second Part doth further agree to pay to the said owner, J. E. Blackmore, the water tax assessed upon said property, additional to the rent aforesaid, with allowance as heretofore.

In Witness Whereof, the said parties have hereunto, in duplicate, set their hands and seals the day and year first above mentioned.

Sealed and delivered in the presence of

J. E. BLACKMORE,
WM. BERGMAN,
WM. SHURTE,
ANTHONY BARBER.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ORAVIA M. BONFIELD,
Plaintiff-Respondent,

vs.

J. EDWARD BLACKMORE,
Defendant-Appellant.

Action at Law.

Brief for Plaintiff-Respondent.

The undisputed evidence shows that the plaintiff desired to purchase a stand, and having been directed to go to a *photographic place* at No. 60 Academy Street, in the City of Newark, *he not knowing the name of the proprietor,* went to No. 60, which had upon *the first floor, the photographic* business of the defendant, p. 56, and upon *the top floor, the photographic business of a tenant.* Defendant owned the building.

As plaintiff was about to enter the building, p. 26, he was intercepted near the entrance, p. 26, l. 4; p. 30, l. 8, by a boy in the store of the defendant, and by reason of what the boy said to him, p. 26, l. 28, and p. 27, he followed the boy back into the store (see page 27) to the elevator; the boy opened the door of the elevator shaft, stepping aside, evidently for the purpose of allowing the plaintiff to enter the elevator; the place was dark, or at least dim, especially to one coming in from the light of the street, p. 72, l. 5 to 32; p. 62, l. 32; p. 63, top; p. 27, l. 30, and the plaintiff could not observe that the elevator was not there, but presuming he was step-

ping in the elevator, he fell down the elevator shaft.

Plaintiff recovered a verdict of $400.

The defendant seeks to reverse the judgment upon substantially two grounds:

First. The contributory neglect of the plaintiff, and Secondly, the absence of neglect of the defendant.

As to contributory neglect, we respectfully urge that this can only exist where a person has acted differently from the manner in which a prudent person having regard for his own safety, would act.

Did not plaintiff do precisely what any reasonable and prudent person would do under like circumstances? He was a stranger desiring to buy a photographic supply. He was directed to an *un-named photographic* store at No. 60. He went there, and assuming he knew there was one on the ground floor, and one on the upper floor, there is no evidence to show that at that time he knew they were two separate photographic concerns. On the contrary, he is met by the boy at the door of the *photographic* store of the defendant—not a different kind of store.

The boy evidently bade him follow him to the elevator, and he did so. The conduct of the boy would impress anyone with the idea that the boy was authorized to do what he did, especially as the boy was the *only person in that portion of defendant's store.* P. 29, l. 33; p. 30, l. 33. (Defendant was at the other end of the store.) Bottom of p. 56, top of 57.

Plaintiff also had the right to assume that it was safe for him to step through the open door. Who would not have done precisely what the

plaintiff did? Should he have asked the boy for his credentials or other proof of his right to meet prospective customers and direct them to the elevator?

There was not the slightest evidence to indicate contributory negligence, but if there was, it was for the jury.

Kargman v. *Carlo,* 56 Vr., 637.

As to Defendant's Negligence

It is immaterial whether Blackmore dealt in the article plaintiff desired. A store-keeper must be an invitor to the public to enter his premises in search of articles which the public have a reasonable right to believe may be obtained of such store-keeper. It can't be possible that if one goes into a large dry-goods store, seeking a particular kind of cloth, that such person is unlawfully upon the premises, or that such store-keeper does not owe to such person the duty of guarding stairways and elevators and other openings, in a reasonable manner, to protect such person from injury. We insist that he owes a duty to *all* who enter his store as prospective customers, and this regardless of whether in fact they become purchasers or not.

An elevator must be considered a dangerous instrumentality, dangerous when operated by an inexperienced person, and the shaft dangerous when left improperly guarded, and the Court will not say as a *matter of law* that the defendant is not guilty of negligence if he leaves a dangerous instrumentality unguarded so a third person may operate it to the harm of another.

This defendant's negligence is shown in two ways:—

First: He violated and wholly ignored the Building Ordinance of Newark and Regulations of the Superintendent of Buildings. These were just as much the law of the City of Newark, as our Legislative enactments are the law of this State. If, however, the legality of such ordinance and regulations are to be questioned, they may not be questioned in this collateral manner, but should be challenged by direct attack, but under the 32nd Section of the Charter of the City of Newark, P. L. 1859, p. 476, it is provided after enumeration of other powers, "that the Council shall have power to make * * * all other ordinances, rules, regulations, etc., not contrary to the laws of this State and the United States, as they may deem necessary, etc."

The right exercised by cities to regulate the operation of elevators, has been so long persisted in, that it seems to be a part of the common law of the land without the citation of any express legislative grant.

These regulations were made not for the purpose of securing the "safety of the elevator," *but the safety of persons using it.* The city considered the elevator and shaft dangerous instrumentalities, and it was reasonable for the jury to find that the failure of this defendant to observe the city laws, was the direct and proximate cause of this happening.

Pesin v. *Jugovitz,* 56 Vr., 256.

Whether an elevator is a passenger or freight elevator, depends upon the *use* to which it is put, and not upon its construction. This elevator was both a passenger, p. 58, l. 35, and

freight elevator, p. 75, l. 24 to 30, and defendant violated the ordinance requiring an attendant for a passenger elevator, and also violated the ordinance requiring a notice to be posted in the freight elevator, reading "persons riding on this elevator, do so at their own risk."

This accident could not have happened if the attendant specified by the ordinance was on duty.

It is immaterial whether the boy in question was in the employ of the defendant, because:—

The defendant knowingly permitted this boy, p. 57, l. 27 to 40; p. 78, l. 30-37; as well as others, p. 77, l. 4, to operate this elevator.

The plaintiff had the right to assume, under the circumstances, at least it was for the jury to say whether he had such right, *that this boy was operating the elevator for the defendant.*

The cases cited by the defendant do not appear to be cases where the situation was regulated by a municipal ordinance.

Second: The negligence of the defendant was established by principles of common law, irrespective of any ordinance, because this elevator, like any other machinery for the transportation of passengers, is a dangerous instrumentality.

I refer to the case of *Smith* v. *N. Y., etc., R. R. Co.,* 17 Vr., p. 12, which seems to negative the idea that where the owner of a dangerous instrumentality has left it in a place where a stranger can readily set it in motion that the owner would not be liable because the injury was due to the act of an intervenor.

Haines v. *Atlantic City R. R. Co.,* 36 Vr., p. 30, in speaking of the Smith case, says: "It

will be observed that in that case, there was fault upon the part of the Company in leaving its loaded car on a switch inclining towards its main track, and liable to be sent down on the latter track."

In the case at bar, there was fault on the part of Blackmore in leaving an elevator in such condition that anybody could operate it and cause it to become dangerous.

The Smith case is also approved in *Salisbury* v. *Erie R. R.,* 37 Vr., bottom of page 234 and 235, in the Court of Errors, and says at p. 234, that the Company was under a duty to maintain its tracks and appliances with reasonable care, and that although in that case, the foreman had loaned the hand-car which did the damage, to a third person, who injured the plaintiff, nevertheless, the Company was responsible.

In the case at bar, the defendant was under the duty of having an attendant operate this elevator or else not allow it to be operated at all.

The case of *Buchanon* v. *Central R. R. Co. of New Jersey,* 50 Vr., 586, treats of a case where a plaintiff fell down an unprotected opening, and the Court declined to say as a matter of law, that the defendant was not negligent, and at p. 590, cites the case of *O'Brien* v. *Tatum,* 84 Ala., 186, which holds that a store-keeper who either expressly or impliedly invites the public to enter his place of business for the purpose of trading, must exercise care to keep his premises safe, and where one so entering is accidentally injured without negligence on his part, by falling into an opening constructed in the store floor, the question of defendant's negligence is for the jury. At page 59, it cites *Gor-*

don v. *Cummings,* 152 Mass., 514, where a letter carrier felt his way along a dimly lighted building and stepped into an elevator opening, Court decided that it was for the jury.

Respectfully submitted,

WILBUR A. HEISLEY,
Counsel for Plaintiff-Respondent.

Arthur W. Cross, Law Printer, 248 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ORAVIA M. BONFIELD, *Plaintiff-Respondent,* *vs.* J. EDWARD BLACKMORE, *Defendant-Appellant.*	*On Appeal from the Supreme Court.*

(ESSEX COUNTY CIRCUIT.)

(Before Hon. Willard W. Cutler, Circuit Judge.)

Brief of Appellant.

Abstract of the Case.

This action was instituted by the plaintiff in the Supreme Court, Essex County Circuit, to recover damages for personal injuries alleged to have been sustained by reason of the negligence of defendant, J. Edward Blackmore, owner of the Blackmore Building, in Newark, and Wilhelm Bergman, a tenant of said building, co-defendants, whereby plaintiff fell down the elevator shaft on the first floor of the Blackmore building. The case was tried before the Honorable Willard W. Cutler, Circuit Judge, on May 16th and 17th, 1916, and resulted in a non-suit of the plaintiff as to defendant Bergman and a verdict for the plaintiff in the sum of Four Hundred Dollars against defendant Blackmore, upon which judgment was entered, and defendant Blackmore appeals therefrom.

Grounds of Appeal.

1. That the Court refused to grant defendant Blackmore's motion for a non-suit.

2. That the Court refused to grant defendant Blackmore's motion to direct a verdict in favor of defendant Blackmore.

3. Because the Court admitted in evidence a certain ordinance of the City of Newark. (S. M., pages 5 to 13, and 35.)

4. Because that Court admitted in evidence certain alleged rules or regulations to the building department of the City of Newark. (Pages 5 to 13, and 35).

Brief of the Argument.

Defendant Blackmore is the owner of a building at No. 60 Academy street, in the City of Newark, known as the Blackmore building.

The first floor of the building is used by defendant Blackmore, as a store where he conducts his business.

The fifth floor of the building, at the time of the accident involved in this case, was rented by defendant Blackmore to defendant Bergman (See Lease Exhibit D 1, Case, page 87) which premises defendant Bergman used as a photo-finishing studio. The entrance to the building is over a tile pavement by a stairway upon the risers of which appear the names of the persons on the upper floors. To the left of this entrance appears a show-case of defendant Bergman's photographs. To the right of this entrance is the show-window, and a door with Blackmore's name on it, through which was the entrance to Blackmore's place of business.

On defendant Blackmore's premises on the first floor was an elevator which he says was a freight elevator used to carry up freight for storage on the upper floors in connection with his (defendant Blackmore's) business. On the 27th of October, 1914, the plaintiff was in search of a photographer's stand, and went to No. 60 Academy street to find the photographer, and attempted to go to the premises of defendant Bergman on the fifth floor. Somewhere near the entrance plaintiff encountered a boy who was in the employ of Mr. Bergman (Case p. 77, l. 1), to whom he said: "I want to see the photographer." (Case p. 26, l. 10). This boy was in the employ of the defendant Bergman, Blackmore did not employ him (Case p. 76, l. 32). Plaintiff, apparently on the boy's invitation, followed the boy into defendant Blackmore's store, where the boy went to the freight elevator, opened the sliding door and the plaintiff stepped in, and there being no elevator there, fell to the basement, receiving the injuries of which he complains.

Defendant Blackmore contends that there was no invitation, express or implied, by him, or anyone authorized to act for him, to come upon his premises and make use of this elevator, and that there was no permission given to the plaintiff, nor to Mr. Bergman, nor to any employee of Mr. Bergman, nor to any prospective customer of Mr. Bergman's, to make use of this elevator, and that the facts proven show no violation of any duty resting upon defendant Blackmore, and do show gross negligence contributing to the accident on the part of the plaintiff. The motion to non-suit and the motion to direct a verdict for defendant Blackmore were denied, and upon these rulings defendant Blackmore predicates error.

Evidence was also erroneously admitted concerning a certain ordinance of the City of Newark and rules alleged to have been made pursuant thereto by the Superintendent of Buildings.

These rules, aside from their lack of promulgation, defendant contends apply only as between the city and defendant and cannot be made the basis of any private right of action.

Undisputed Facts.

The plaintiff testifies as to why he went to the building at 60 Academy street: "A friend of mine who is a photographer * * * * came to me and he said that this photographer would be able to supply one of those stands" which plaintiff desired to purchase. (Case, page 25, l. 36.) Plaintiff said he had never been in this building before and that he got there about noon hour, and, "As I was entering the door a lad came out and asked who I wanted to see, and I said 'I want to see the photographer' ". (Case page 26, l. 1-10). Plaintiff then says: "I followed him (the boy) to the elevator." (Case page 27, l. 2). "The elevator is a little way in from the door. There is a stairway on the same side" Case, page 27, l. 10.) "I started following this boy to the elevator, which is a way in the store on the same side as the stairway, more under the stairway, in that direction, and after we reached the elevator he stood to the side and he opened the door and stepped in the sideway. Of course there was no light there and the light is cut off somewhat by the stairway and the window, which is in front, and does not give much light toward the elevator * * * * When he opened the door and stepped in the side-way

I looked straight ahead and stepped in." (Case page 27, ll. 30-40.)

"The elevator door was a sliding door" (Case page 28, l. 27).

The boy "stood sideways. He stepped in a side position just as one would in giving you passageway to go in." (Case p. 28, l. 31).

The boy "pulled the door this way, and stood this way, and I was right there as he opened the door."

"Q Did he attempt to stop you in any way? A No, sir.

Q Did he warn you not to step in? A A No, sir. (Case p. 29, l. 10-18).

Q Was there anybody in the store but the boy that you saw? A No, at that time I did not see anyone excepting the boy.

Q What happened to you after you stepped to the door of the shaft? A As I fell down, I stepped in—down I went. There was nothing there and I fell to the cellar bottom. (Case p. 30, l. 31-40).

Q Did you see any elevator there? A No, sir.

Q Did you look to see if any was there? A Yes, I looked ahead of me as I went in.

Q Did the line of your vision as it passed through this door go in the direction of the shaft or not? A I did not know where it was but following the boy, when he went there, of course, going in from the light, I followed him and when he stopped and opened the door, then as I said, I stepped in.

Q As you stepped into the door of the shaft were your eyes open? A Yes, sir.

Q Where were you looking? A Ahead of me.

Q Into the shaft? A Yes, right in.

Q Did you see any elevator? A No, sir.

Q Was there any light there? A No, sir.

Q Is there anything the matter with your eyes? A No, sir.

Q Was your eyesight good on this day? A Yes, sir. (Case p. 31, l. 24-40, and p. 32, l. 1-5).

Q Was there any lamp or light burning there near the elevator door that you stepped into? A No, I did not see any." (Case p. 35, l. 1).

At the door of the elevator plaintiff says:

"It was rather dim in comparison with the light from the outside and coming in from the light outside, and when I got to the door of the elevator it was dim. There was no light there." (Case p. 35, l. 24).

Plaintiff says that he knew the building he was going to, but "I knew the store, but not the person in charge of it that I would call on." (Case p. 41, l. 45).

"Q Did you know what floor of the building the photographer was on who you intended to see? A No, sir. (Case p. 42, l. 4).

Plaintiff on cross examination says: "Q Did you or did you not see a stairway there? A Yes, I saw a stairway.

Q Did that stairway go up in that building, No. 60, go toward the upper part of that building? A It goes up.

Q You saw it that day going up? A Yes.

Q As far as you could see? A Yes." (Case p. 43, l. 10).

Plaintiff's witness, Watkins, testified that he worked in defendant Blackmore's place in Octo-

ber, 1914, and that defendant Blackmore conducted a photo and art supply business (case p. 56, l. 20), and that Mr. Blackmore was in the the building at the time of the accident (case p. 56, l. 40), but that there was nobody in the front entrance of the store, so far as he knew (Case p. 57, l. 3), and that witness was at the other end of the store, away from the entrance, back where Mr. Blackmore was. (Case p. 57, l. 10). This witness said he had often seen the boy, who brought the plaintiff into the store, operating this elevator (Case p. 57, l. 30), and when Mr. Blackmore was present (Case p. 57, l. 40). He says he has seen people taken up in that elevator more than once (Case p. 58, l. 3); says he saw people carried up in the elevator every day (Case p. 58, l. 33). He says that some tenants upstairs occasionally ran the elevator (Case p. 59, l. 20).

The door in the elevator shaft was glass (Case p. 62, l. 6-17). When the elevator was up above the first floor in the shaft it made it dim in the shaft (Case p. 62, l. 38).

At the time of the accident Mr. Blackmore used the first floor. There was no one on the second floor, no one on the third floor, no one on the fourth floor, and the photographer, defendant Bergman, used the fifth floor, and he was the only tenant in the building (Case p. 64, l. 20-28). This witness ran the elevator when Blackmore told him, with bills and supplies (Case p. 65, l. 4).

At the time of the accident there was a dim gas light in the basement (Case p. 65, l. 10).

The people that went up and down in the elevator were Mr. Blackmore's employees and Mr. Bergman, the tenant upstairs, and his employees. (Case p. 65, l. 20). Also "some

bunches'' of Mr. Bergman's employees (Case p. 65, l. 26). Merchandise was taken up to Mr. Bergman in this elevator (Case p. 65, l. 30).

This witness finally admits that Mr. Blackmore had some merchandise on the sixth floor (Case p. 66, l. 14).

Mr. Blackmore had no goods for sale except on the first floor (Case p. 66, l. 20).

Q So those people you saw going up there every day were either yourself or Mr. Blackmore's two other employees, or Mr. Bergman? A That is right. (Case p. 66, l. 23). This witness finally says that only *''once in a while''* had he seen outsiders come in from the street and go up to Bergman's floor in the elevator (Case p. 67, l. 8-18).

In order to start the elevator it is necessary to pull the cable which ran through it. (Case p. 68, l. 1-10). This cable was on the left-hand side going in to the elevator (Case p. 68, l. 12). The door in the elevator shaft slid to the left. (Case, p. 68, l. 25).

For the defense—

Defendant Blackmore testifies that this elevator on his premises was used as a freight elevator (Case p. 75, l. 28) and that he leased the premises on the fifth floor to defendant Bergman (Case p. 76, l. 5; p. 87, Exhibit D 1).

Defendant Blackmore allowed Bergman to use the elevator to take up merchandise to his own premises on the fifth floor (Case p. 76, l. 15). There is no provision in the lease for furnishing any elevator service. (Case p. 87, Exhibit D 1). The boy who opened the elevator door for the plaintiff was not in the employ of Mr. Blackmore, (Case p. 76, l. 32), and defendant Blackmore did not know him or anything about

him, and, as one of Mr. Bergman's help, paid no attention to him. (Case p. 76, l. 38, and page 77, l. 1). Defendant Blackmore could not recall that he had ever seen this boy use the elevator (Case p. 77, l. 10). Mr. Blackmore at times allowed Mr. Bergman or his employees to use the elevator. (Case p. 77, l. 12). Knowingly he allowed no others. (Case p. 77, l. 18). Blackmore never required sufficient use of the elevator to have a special elevator employee. (Case p. 77, l. 38). Blackmore never, on any occasion, permitted this boy who opened the elevator door to use the elevator. (Case p. 78, l. 28).

Point I.

THE MOTIONS TO NON-SUIT AND TO DIRECT SHOULD HAVE BEEN GRANTED.

Defendant's argument naturally follows under the following heads:

First: If there were any negligence shown chargeable to defendant Blackmore it was not the proximate cause of the plaintiff's damage because (a) an independent, intervening cause broke the chain of causation. (b) It was not to be anticipated by the reasonably prudent man that a properly constructed elevator on his premises would be tampered with as in this case.

Second. Defendant having provided a properly constructed elevator, which was used for a proper purpose on his premises, there was no invitation, actual or implied, for the plaintiff to use it.

Third. The plaintiff's negligence chiefly contributed to the accident.

As a general statement of the case stripped of all repetitions, the plaintiff, in order to purchase a standard, went to the premises, 60

Academy street, and entered defendant Blackmore's store. Defendant Bergman was not in the business of selling anything and therefore there was no invitation to the plaintiff to go to his premises (For this reason plaintiff was nonsuited as to Bergman, Case p. 75). Defendant Blackmore had no goods for sale other than on the first floor, consequently there was no invitation by him to go elsewhere than on the first floor.

A boy not in Blackmore's employment but in the employ of Bergman met the plaintiff somewhere near the door of Blackmore's store and the plaintiff followed the boy to the elevator, the door of which was closed. The boy opened it, stepped back and the plaintiff looked straight ahead of him with his eyes open, stepped in and fell.

First.

OUR FIRST CONTENTION IS THAT ANY NEGLIGENCE OF BLACKMORE'S WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S DAMAGE.

The only conceivable negligence which could be chargeable to Blackmore, assuming the most favorable possible construction of the facts for the plaintiff, would be that he left the elevator, properly constructed, and with the door of the shaft closed, without an employee or other person in charge of it to regulate the use of it. Assuming this, however, this cannot be held to be the cause of the accident.

> "By the great weight of authority, it is as necessary for the plaintiff to establish the fact that the injury was one which might have been reasonably anticipated by the

doer of the negligent act as it is to show that there was no other efficient, intervening cause." (11 L. R. A. (N. S.) page 684).

Justice Lippincott says in *Hammill* v. *Railroad,* 27 Vr. 378, "We look for the primal negligence contributing to the injury, and then follow it up to its natural consequence and ascertain whether any independent, efficient cause intervenes to produce the injury. * * * * * The negligence to render the defendant liable must be *causa-causans,* and not merely the *causa sine qua non.*"

(A) THERE WAS AN INTERVENING, INDEPENDENT, EFFICIENT CAUSE.

We find a very similar case to that at bar in *Cole* v. *Germania Savings and Loan Society,* 59 C. C. A. (124 Fed. Rep. 113.) A boy was seen on a number of occasions using the elevator and on one occasion attempting to operate it, but he was a stranger to both plaintiff and defendant. On the occasion of the accident he hurried past the plaintiff as she passed through the hallway of defendant's building, where the public was accustomed to use the elevator. After pushing past plaintiff the boy pushed back the sliding door of the elevator as far as it would go and then stood back, and the plaintiff, supposing him to be the elevator boy, stepped in and fell to the bottom of the shaft. The hall was dark and it was difficult to see the elevator, even when in place, and it was proven that the elevator door was occasionally left open. The Court held that the negligence of defendant was not the proximate cause of the accident, but that the act of the strange boy was the independent, intervening cause, which could not be foreseen or reasonably anticipated as the probable result

of defendant's negligent acts, and held that this cause interrupted the ordinary sequence of events and broke the casual connection. In this case, the elevator was for use by the public as passengers and was not as in the case at bar a freight elevator.

In the case of *Board of Trade* v. *Cralle,* decided by the Supreme Court of Appeals of Virginia, 63 S. E. Rep., 995, the owner of an office building left the door of the elevator in the building open and unattended. A tenant of the building entered one Sunday morning to go up to his office and found an oiler in the shaft of the elevator, fixing it. In the absence of the regular elevator operator, who was somewhere else at the time, the oiler volunteered to operate the elevator and take the tenant up. The Court held that the tenant's injury was not due proximately to the negligence of the defendant, but the action of the volunteer oiler was an independent, intervening cause.

In *Claypool* v. *Wigmore,* 34 Ind. App. 35 (71 N. E. Rep. 509), the act of a companion of the plaintiff who opened the door of the elevator was held to be an intervening, independent cause.

In *Faris* v. *Hoberg,* 134 Ind. 269 (33 N. E. 1028), a man entered the rear door of a store with the permission of the owner, for the purpose of looking for a drayman, and fell down an unguarded shaft. It did not appear that the unguarded condition of the shaft was in any way attributable to the defendant. The Court directed a verdict for the defendant.

In *Molloy* v. *N. Y. Real Estate Exchange,* 156 N. Y., 205, the owner of a freight elevator was held not liable where a person in no way connected with him, and not in his employ, had de-

liberately moved the elevator and had left the well-hole unguarded, so that a drayman, coming lawfully on the premises and seeing the guard chains off supposed that the elevator was there and walked in.

In *O'Brien* v. *Western Steel Co.,* 100 Mo. 182 (13 S. W. 402), the Court held that it was not the duty of the owner of a freight elevator to change its construction or operation because persons, for their own convenience, were permitted to ride on it (in that they used it without remonstrance on his part), and the Court held that the only duty such use could impose was that the owner should operate the elevator in his business with ordinary care, having in view such permitted use of it by others, and this rule was proved in *Wise* v. *Ackerman,* 76 Md. 375 (25 Atl. 424).

In McDonough v. *Pelham Hod Elevator Co.,* 111 App. Div. (N. Y.) 585, the Court held that where an elevator was installed for the purpose of carrying building materials there arose a presumption that a person riding on it who was not an employee was doing so without the consent of the owner, and if the engineer, who was an employee, attempted to transport such a third person by means of said elevator, he was acting outside of the scope of his authority and the owner was not responsible.

In the case of *Urban* v. *Focht,* decided by the Supreme Court of Pennsylvania, reported in 81 Atl., page 55, the plaintiff, an employee of a sub-contractor, was injured while using an elevator maintained by the main contractor which was not intended for his use, even though he

used it with the permission of the main contractor's foreman. The Court says (page 56):

> "Plaintiff was hurt while using an appliance of defendant, which was not there for plaintiff's use and which the latter had no right, springing from his relation to defendant, to use. True, the defendant's foreman allowed him to use it. But in making use of that permission plaintiff was a mere licensee, assuming as such the risks involved in the use of the elevator just as it was. It is in the nature of a mere license that its grant creates no duty and imposes no obligation upon the licensor to provide against danger or accident." (Citing cases).

In *Mills* v. *Brandes,* in the same Court, reported in 83 Atl. 710, an action was brought by a servant of a sub-tenant against the tenant of the entire building for injuries from a fall down an unguarded elevator shaft. The Court held that the plaintiff was not entitled to have her case submitted to the jury in the absence of evidence that defendant or any of his employees had left the shaft open where the only inference from the evidence was that some person, whose identity was absolutely unknown, although probably an employee of plaintiff's employer, had used the elevator and left the shaft open.

The Court held that there was nothing to indicate that the defendant was in any way responsible for the position in which the elevator was found at the time of the accident, or for the existence of the open hatchway.

In the case at bar there is no doubt as to who caused the door to be opened and the plaintiff to have an opportunity to step into the elevator.

It was not an employee of defendant, but a stranger. Plaintiff's counsel never made good his promise (Case p. 57, l. 32), to connect this stranger with defendant Blackmore.

(B) NO SUCH OCCURRENCE AS THIS ACCIDENT COULD HAVE BEEN REASONABLY ANTICIPATED BY THE DEFENDANT BLACKMORE TO RESULT FROM HIS ACTION AS SHOWN IN THIS CASE, IN NOT HAVING A SPECIAL EMPLOYEE IN CHARGE OF THE ELEVATOR.

As has been stated above, this element of reasonable anticipation is essential.

Mr. Cooley, in his work on Torts (3rd Ed.) Page 73, cites Addison, page 6, with approval: "If the wrong and the resulting damage are not known by common experience to be natural and usual in sequence and the damage does not, according to the course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or cancatenated as cause and effect to support an action." (See Opinion of Justice Strong in *Milwaukee Railroad* v. *Kellogg,* 94 U. S. 469, Thompson on Negligence, Vol. 1, Sec. 49). It is also important to remember that what is to be reasonably anticipated is not to be judged in the light of subsequent events, nor according to what can be seen at the time of trial; but by what a person of ordinary care and prudence would do in the conduct of his own affairs. (See *Empire Co.* v. *Atch., etc.,* 135 Fed. Rep. 135).

Defendant Blackmore had his store where he sold his goods on the first floor of the building. He had a properly constructed elevator, some distance from the front of his store, which went

through the store in a properly enclosed shaft, and the entrance door in this shaft was closed. This elevator was used for taking freight and merchandise to the upper floors, none of which were occupied except the top, which was occupied by Mr. Bergman, who did not have goods on sale on his premises, and therefore no requirement to use the elevator for customers. Some of Mr. Blackmore's goods were stored on one of the upper floors, but this did not require the use of the elevator by customers. The elevator, according to the testimony of one witness, was used "once in a while" by outsiders, (Case p. 67, l. 18), otherwise only by employees of the two defendants. Mr. Blackmore says that he did not use the elevator enough for the carrying of merchandise to make it worth his while to have a man employed for the sole purpose of running it. The door of the shaft was kept closed.

On such evidence can it be reasonably contended that defendant Blackmore can be held to have reasonably anticipated that someone not in his employ, a stranger, would go to that elevator shaft and open the door and invite another stranger to enter? It is submitted that this is the last thing that he would anticipate, conducting his affairs in the ordinary course of business, and in a reasonably careful manner. The action of the boy and of the plaintiff, both not to be anticipated, was unusual and was something which the defendant Blackmore could not be called upon to guard against or anticipate as a reasonably prudent man.

Second.

DEFENDANT BLACKMORE DID NOT VIOLATE ANY DUTY WHICH RESTED UPON HIM IN CONNECTION WITH THE PLAINTIFF.

Defendant Blackmore was conducting a store on the first floor. Defendant Bergman was not conducting a store on the fifth floor, consequently the only place to which prospective customers and the public were invited by implication was the first floor, or the Blackmore store.

The case is barren of any express invitation from Bergman to go up to his place—in fact this is completely negatived and the case was non-suited as to Bergman for that reason. Nor was there any express invitation by Blackmore or any employee, or anyone representing him, to go anywhtre. We are naturally left to what plaintiff contends is implied. This implied invitation, however, extends only to the first floor.

This Court in *Ryerson* v. *Bathgate,* 38 Vr. page 337, lays down the rule in this State:

> "The owner's liability for the condition of the premises is only co-extensive with his invitation, and it is incumbent upon the plaintiff to show not only that her entry upon the premises was by invitation of the owner, but also that at the time the injury was received she was in that part of the premises into which she was invited to enter and was using them in a manner authorized by the invitation, whether express or implied." (pp. 338-339).

Also at p. 339: "She was injured because she inferred that the doorway led to a closet and thereupon attempted to enter without taking observations herself." In the case at bar the

plaintiff inferred the elevator was there and made no observations.

In *Schmidt* v. *Bauer,* 80 Cal. 565 (5 L. R. A. 580), the Court holds that there is no duty upon an owner to keep safe such parts of a building as are used for the private purposes of the owner, unless the person injured has been induced by the invitation or allurement of the owner, express or implied, to enter therein."

It is also important to notice the rule of law laid down in *Menteer* v. *Scalzo Fruit Co.,* 240 Mo. 177, that an individual—one of a class or of the public, cannot himself enlarge the invitation of a merchant to go upon his premises, to include parts of the premises which the public do not customarily use. "When an invitee steps clearly beyond the bounds of his invitation he then becomes a mere licensee, at most, and must take as he finds it the part of the premises he then enters."

There is nothing in the evidence in this case as to defendant Blackmore which can be construed as an implied invitation to use this elevator. The Court non-suited as to defendant Bergman because Bergman had no goods for sale on the fifth floor, and that consequently there was no invitation to the plaintiff to go up there, and that the act of Bergman's employee in endeavoring to take the plaintiff up there was therefore outside of his authority and Bergman was not responsible. This is equally true as to Blackmore. He had no goods for sale except on the first floor and it was not his employee or representative who induced the plaintiff to attempt to use the elevator, and the case should have been non-suited as to him as well as Bergman. Certainly the act of a third party cannot enlarge the invitation or bind the defendant Blackmore.

Third.

THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

No matter what else may be said of this case, we submit that the plaintiff's contributory negligence conclusively appears: He walked into the elevator shaft with his eyes open, looking straight ahead of him, without any excuse. As was stated in the case of *Donahue* v. *Braff,* 122 App. Div. 552, "The slightest attention to the door before he attempted to open it, or the slightest look after he opened the door and before he stepped in, would have apprised him of the situation and prevented the accident."

Further, we have a case which is practically on all fours with the case at bar and we submit controlling: It is *Baker* v. *Dean,* 69 Ill. App, 613.

Plaintiff entered a store on business and had occasion to go to one of the upper floors. An employee of defendant offered to take him up in the freight elevator and the employee pushed up a sliding door and was doing something which was necessary to bring the elevator down from above where it was, to the level of the floor when the plaintiff stepped by him into the shaft. The place was so dark that he could not see quite clearly. The Court held there could be no recovery, as his own want of care in passing by the employee into the dark was what led to his misfortune.

A *fortiori,* in the case at bar, the plaintiff's act in passing by the boy who opened the door and stood aside and stepped into the darkness was what caused his misfortune.

The cases of *Bremer* v. *Pleiss,* 121 Wis. 61, where the guest of a hotel pushed open a partly

opened elevator door and stepped in, and of *Ballon* v. *Collamore,* 160 Mass., 246, where a boy after using the lower or baggage compartment of an elevator stepped back into the shaft after the operator had gone up with the elevator, support the principle laid down by the Court in the above Ill. case.

It is useless to cite cumulative authorities on this question of contributory negligence, and I will merely call attention to the old case of *Butterfield* v. *Forrester,* 11 East. 60, decided in 1809, where defendant had negligently placed a pole so that it projected into the street, and the plaintiff not observing the obstruction negligently rode against it. Lord Ellenborough says:

> "A party is not to cast himself upon an obstruction which has been left by the fault of another, and avail himself of it, if he does not himself use common and ordinary caution to be in the right."

This is authoritative today and bears directly on the facts of the case at bar. How can this plaintiff hold defendant Blackmore when he testifies that he walked, looking directly ahead of him with his eyes open, into a dim unknown?

Point II.

THE COURT ERRED IN ADMITTING THE ORDINANCE OF THE CITY OF NEWARK AND THE REGULATIONS ALLEGED TO HAVE BEEN MADE THEREUNDER AND IN REFUSING TO STRIKE OUT THE SAID ORDINANCE AND ALLEGED REGULATIONS.

Defendant contends that the city of Newark had no authority to pass the ordinance that was introduced in evidence. The Charter of the city

and general statutes relating to cities may be searched in vain for the vesting of any authority in municipalities for this purpose. So far as the regulations alleged to have been made by the superintendent of buildings is concerned, it appears that all the said officer did was to make up what he thought was a set of rules and keep them in stock in his office in case any curious citizen desired copies of them. It is conceded that no copy is on file with the City Clerk; that the superintendent of buildings has no signed copy in his office (S. C., p. 42, l. 10). No claim is made that they ever were advertised. Assuming that the municipality had authority to regulate elevators and assuming that it had authority to delegate that power to the superintendent of buildings (both of which assumptions the defendant denies), it certainly was necessary to do all acts which would be necessary to make a valid ordinance and this not having been done, it is respectfully submitted that the so-called regulations are not valid.

Assuming everything that it is necessary to assume in order to make the ordinance and so-called regulations valid, they could have no bearing upon the present case. They do not of themselves create a private right of action in the plaintiff (*Evers* v. *Davis,* 86 N. J. L. 196) and they impose no duty upon the defendant towards this plaintiff because, according to the evidence in the case, the elevator was a freight elevator. How could the regulations, if valid, operate upon the common law conscience of the defendant when he owed no duty to the plaintiff?

We submit that the Court should not have admitted the ordinance and regulations and should have stricken them out when requested to do so by counsel.

Point III.

It is respectfully submitted that the verdict should be set aside, and that this Court should order the entry of a Judgment of Non-Suit in favor of defendant Blackmore against the plaintiff.

M. CASEWELL HEINE,
Attorney and of Counsel for
Defendant Blackmore.